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Colorado

Revised Statutes

2012

Colorado Court Rules
Book 2

**Containing the Rules adopted or amended
by the Supreme Court of Colorado
and received by July 1, 2012**



**Annotated, Indexed, and Prepared for Publication
Under the Supervision and Direction of the**

COMMITTEE ON LEGAL SERVICES

by

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(2011), and 41 Colo. Law. 91 (January 2012). (See Annotation Explanation on page v.)**

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Court rule changes received from the Supreme Court for publication by the Office of Legislative Legal Services after July 1, 1984, for the rules of county court civil procedure, rules of procedure for small claims court, rules of probate procedure, rules of juvenile procedure, rules for traffic infractions, municipal court rules of procedure, rules of jury selection and service, appellate rules, rules of evidence, rules for magistrates, local water court rules, and rules governing the commission on judicial performance contain source information showing the date rules were enacted by the court and the effective date.

Court rule changes received for publication by the Office of Legislative Legal Services after July 1, 1990, for the rules of civil procedure contain source information showing the date rules were enacted by the court and the effective date.

To obtain prior source information, see the original volume 7, volume 7A from 1977, and volume 7B from 1984.

Annotations

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the court rules.

CHAPTER 28

**The Colorado
Rules of
Juvenile Procedure**

**Repealed and Reenacted by the
SUPREME COURT OF COLORADO**

June 16, 1988,

Effective January 1, 1989

ANALYSIS BY RULE

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CHAPTER 28

COLORADO RULES OF JUVENILE PROCEDURE

Cross references: For the juvenile court of Denver, see article 8 of title 13, C.R.S.

PART ONE — APPLICABILITY

Rule 1.

These rules govern proceedings brought in the juvenile court under Title 19, 8B C.R.S. (1987 Supp.), also hereinafter referred to as the Children's Code. All statutory references herein are to the Children's Code as amended. Proceedings are civil in nature and where not governed by these rules or the procedures set forth in Title 19, 8B C.R.S. (1987 Supp.), shall be conducted according to the Colorado Rules of Civil Procedure. Proceedings in delinquency shall be conducted in accordance with the Colorado Rules of Criminal Procedure, except as otherwise provided by statute or by these rules.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted April 17, 1997, effective July 1, 1997.

ANNOTATION

Law reviews. For article, "Confessions and the Juvenile Offender", see 11 Colo. Law. 96 (1982). For article, "Toward an Integrated Theory of Delinquency Responsibility", see 60 Den. L.J. 485 (1983). For article, "Colorado Juvenile Court History: The First Hundred Years", see 32 Colo. Law. 63 (April 2003).

Juvenile who is detained is entitled to a preliminary hearing by constitutional mandate. The right to a preliminary hearing in all other instances is based upon interpretation of the Colorado children's code and the Colorado rules of juvenile procedure. *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982).

When juvenile entitled to preliminary hearing. Juveniles charged in delinquency proceedings with crimes (Felonies and class 1 misdemeanors) subject to Crim. P. 5 and 7 are entitled to a preliminary hearing. Juveniles held on lesser charges are not granted a right to a preliminary hearing by statute or by rule. *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982).

Applicability of rules of civil procedure. The Rules of Juvenile Procedure and the appli-

cable statutes are silent as to the effect of a direction from the court or commissioner to counsel to prepare an order; and the Rules of Civil Procedure, therefore, are applicable. *People ex rel. M.C.L.*, 671 P.2d 1339 (Colo. App. 1983).

Applied in *People in Interest of S.S.T.*, 38 Colo. App. 110, 553 P.2d 82 (1976); *People in Interest of C.R.*, 38 Colo. App. 252, 557 P.2d 1225 (1976); *People in Interest of D.A.K.*, 198 Colo. 11, 596 P.2d 747 (1979); *People v. District Court*, 199 Colo. 197, 606 P.2d 450 (1980); *People in re J.B.P.*, 44 Colo. App. 95, 608 P.2d 847 (1980); *People in Interest of C.A.K.*, 628 P.2d 136 (Colo. App. 1980); *In re U.M. v. District Court*, 631 P.2d 165 (Colo. 1981); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People in Interest of B.J.D.*, 626 P.2d 727 (Colo. App. 1981); *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982); *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982); *People in Interest of A.L.C.*, 660 P.2d 917 (Colo. App. 1982); *People ex rel. J.F.*, 672 P.2d 544 (Colo. App. 1983); *People in Interest of M.M.T.*, 676 P.2d 1238 (Colo. App. 1983).

PART TWO — GENERAL PROVISIONS

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of juvenile proceedings. They shall be construed to secure simplicity in procedure and fairness in administration.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Colorado rules of juvenile procedure reflect supreme court's judgment concerning the manner in which juvenile courts should proceed in applying the Colorado children's code. *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982).

Juvenile defendants best served by informal judicial setting. The juvenile system is

premised on the concept that a more informal, simple, and speedy judicial setting will best serve the needs and welfare of juvenile defendants. *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982).

Applied in *S.A.S. v. District Court*, 623 P.2d 58 (Colo. 1981).

Rule 2.1. Attorney of Record

(a) An attorney shall be deemed of record when the attorney appears personally before the court, files a written entry of appearance, or has been appointed by the court.

(b) The clerk shall notify an attorney appointed by the court. An order of appointment shall appear in the file.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

Rule 2.2. Summons — Service

(a) When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

(b) When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Civil Procedure, subsequent pleadings and notice may be served on such parties by regular mail.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a) amended and adopted, effective February 24, 1999; entire rule amended and adopted and committee comment added and adopted December 14, 2000, effective January 1, 2001.

COMMITTEE COMMENT

Under Rule 2.2, a single publication is sufficient. There is no need for four weeks of publication.

Rule 2.3. Emergency Orders

(a) On the basis of a report that a child's or juvenile's welfare or safety may be endangered, and if the court believes action is reasonably necessary, the court may issue an ex parte order.

(b) Where the need for emergency orders arises, and the court is not in regular session, the judge or magistrate may issue such orders orally, by facsimile, or by electronic filing. Such orders shall have the same force and effect. Oral orders shall be followed promptly by a written order entered on the first regular court day thereafter.

(c) Any time when a child or juvenile is subject to an emergency order of court, as herein provided, and the child or juvenile requires medical or hospital care, reasonable effort shall be made to notify the parent(s), guardian, or other legal custodian for the purpose of gaining consent for such care; provided, however, that if such consent cannot be secured and the child's or juvenile's welfare or safety so requires, the court may authorize needed medical or hospital care.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

ANNOTATION

Emergency custody order constitutional. An ex parte emergency order placing children under protective custody, pursuant to this rule, does not violate the parent's right to due pro-

cess. *People v. Coyle*, 654 P.2d 815 (Colo. 1982) (decided under rule 15 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures).

Rule 2.4. Limitation on Authority of Juvenile Magistrates

No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.

Source: Entire section added and effective February 3, 1994.

PART THREE — DELINQUENCY

Rule 3. Advisement

(a) At the first appearance before the court, the juvenile and parent, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:

- (1) The nature of the allegations contained in the petition;
- (2) The juvenile's right to counsel and if the juvenile, parent, guardian, or other legal custodian is indigent, that the juvenile may be assigned counsel, as provided by law;
- (3) The juvenile need make no statement, and that any statement made may be used against the juvenile;
- (4) The juvenile has the right to a preliminary hearing, as set forth in Section 19-2-705, C.R.S.;
- (5) The juvenile's right to a jury trial, as provided by Section 19-2-107, C.R.S.;
- (6) That any plea of guilty by the juvenile must be voluntary and not the result of undue influence or coercion on the part of anyone;
- (7) The sentencing alternatives available to the court if the juvenile pleads guilty or is found guilty;
- (8) The juvenile's right to bail as limited by Sections 19-2-508 and 19-2-509, C.R.S., and the amount of bail, if any, that has been set by the court; and
- (9) That the juvenile may be subject to transfer to the criminal division of the district court to be tried as an adult, as provided by Section 19-2-518, C.R.S.

(b) If the juvenile pleads guilty to the allegations in the petition, the court shall not accept the plea without first determining that the juvenile is advised of all the matters set forth in (a) of this Rule and also determines that:

- (1) The juvenile understands the nature of the delinquent act alleged, the elements of the offense to which the juvenile is pleading guilty, and the effect of the juvenile's plea;
- (2) The plea of guilty is voluntary on the juvenile's part and is not the result of undue influence or coercion on the part of anyone;
- (3) The juvenile understands and waives his or her right to trial, including the right to a jury trial, if authorized by statute, on all issues;
- (4) The juvenile understands the possible sentencing alternatives available to the court;
- (5) The juvenile understands that the court will not be bound by representations made to the juvenile by anyone concerning the sentence to be imposed; and
- (6) There is a factual basis for the plea of guilty. If the plea is entered as a result of plea agreement, the court shall satisfy itself that the juvenile understands the basis for the plea agreement, and the juvenile may then waive the establishment of a factual basis for the particular charge to which the juvenile is pleading guilty.
- (c) If the juvenile pleads not guilty to the allegations in the petition, the court shall set the matter for an adjudicatory trial.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a)(4), (a)(5), (a)(8), (a)(9), and (b)(3) amended and adopted April 17, 1997, effective July 1, 1997.

ANNOTATION

Law reviews. For article, "Representing the Mentally Retarded or Disabled Parent in a Colorado Dependent or Neglected Child Action", see 11 Colo. Law. 693 (1982). For article, "The Nuts and Bolts of Juvenile Delinquency", see 31 Colo. Law. 19 (October 2002).

This rule is the substantial equivalent of Rule 11, Crim. P., so that the court may analogize to it and the cases dealing with a guilty plea withdrawal. *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982).

And codifies juvenile's constitutional rights. This rule is the codification of the standards guaranteeing a juvenile's constitutional rights. *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982).

Test to determine valid waiver of rights. In determining whether there has been a valid waiver of a juvenile's rights, the factual circumstances of each case must be examined; that is, the "totality of circumstances" test is applied. *People v. Cunningham*, 678 P.2d 1058 (Colo. App. 1983).

Presence of parent. The parent is there to assure that the juvenile is provided with parental guidance and moral support, as well as some assurance that any waiver of the juvenile's rights is made knowingly and intelligently. *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982).

Of critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile is the presence of the parent. *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982); *People v. Cunningham*, 678 P.2d 1058 (Colo. App. 1983).

The Colorado rules of juvenile procedure do not require that a child must be accompanied by a parent, guardian, or legal custodian at all proceedings, even though the juvenile's first court appearance requires that a parent, guardian, or legal custodian be fully advised of the child's rights. Therefore, juvenile's waiver of rights during trial, adjudication of delinquency, or sentencing is not necessarily invalid. *People in Interest of S.A.R.*, 860 P.2d 573 (Colo. App. 1993).

Failure to comply with rule voids disposition. Where the referee in two prior delin-

quency hearings failed to comply with the mandates of this rule, those prior dispositions are constitutionally void, and cannot be used as to basis for enhanced punishment proceedings under § 19-3-113.1. *People v. M.A.W.*, 651 P.2d 433 (Colo. App. 1982).

Court not required to warn of possible future consequences of guilty plea. In the absence of a specific requirement by statute or rule, a juvenile court is not required to advise the juvenile of consequences of a guilty plea which would result from the future commission of felonies. *People v. District Court*, 191 Colo. 298, 552 P.2d 297 (1976).

Child does not have an absolute constitutional or statutory right to bail pending adjudication of the charges filed against him in juvenile court. *L.O.W. v. District Court*, 623 P.2d 1253 (Colo. 1981).

Applicability of Rule 46, C.R. Crim. P., to juvenile proceedings. Rule 46, C.R. Crim. P., does not apply to admission to bail in juvenile proceedings to the extent it is inconsistent with this rule and the children's code. *L.O.W. v. District Court*, 623 P.2d 1253 (Colo. 1981).

Presumption of release pending dispositional hearing. A trial court may detain a juvenile without bail only after giving due weight to a presumption that a juvenile should be released pending a dispositional hearing, except in narrowly defined circumstances where the state establishes that detention is necessary to protect the child from imminent harm or to protect others in the community from serious bodily harm which the child is likely to inflict. *L.O.W. v. District Court*, 623 P.2d 1253 (Colo. 1981).

Where juvenile's natural parents' parental rights have been terminated and the juvenile has been placed in the custody of the state department of social services, the department could act properly on juvenile's behalf as his legal custodian. *People v. Cunningham*, 678 P.2d 1058 (Colo. App. 1983).

Applied in *People in Interest of M.M.*, 41 Colo. App. 44, 582 P.2d 692 (1978); *People v. Alward*, 654 P.2d 327 (Colo. App. 1982); *People in Interest of C.R.B.*, 662 P.2d 198 (Colo. App. 1983).

Rule 3.1. Petition Initiation, Form and Content, Time Limit for Filing Petition

(a) A petition concerning a juvenile who is alleged to be delinquent shall be initiated in accordance with Section 19-2-512 and 513, C.R.S.

(b) If the petition is not filed within seventy-two (72) hours (excluding Saturdays,

Sundays, and official court holidays) after a juvenile is taken into custody and not released to a parent, guardian or legal custodian, said juvenile shall be released upon order of court; provided that upon application to the court by the district attorney or any interested party and for good cause shown, the above time period may, in the discretion of the court, be extended for a reasonable period of time to be fixed by said court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted April 17, 1997, effective July 1, 1997.

ANNOTATION

Annotator's note. Since rule 3.1 is similar to rule 7 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure, a relevant case construing that provision has been included in the annotations to this rule.

Petition is similar to information in criminal law. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Sufficiency of petition in delinquency. A petition in delinquency is sufficient if it advises the juvenile of the nature and cause of the accusation against him, so that he can ade-

quately defend himself. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Petition need not specify lesser included offenses. A petition in delinquency need not specify lesser included offenses which may have been committed in commission of the described act. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

And incorrect citation of statutory reference in petition is not grounds for reversal, absent substantial prejudice. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Rule 3.2. Responsive Pleadings and Motions

(a) No written responsive pleadings are required. Jurisdictional matters of age and residence of the juvenile shall be deemed admitted unless specifically denied.

(b) Any defense or objection which is capable of determination without trial of the general issues may be raised by motion.

(c) Defenses and objections based on defects in the institution of the action or in the petition, other than it fails to show jurisdiction in the court, shall be raised only by motion filed prior to the entry of a plea of guilty or not guilty. Failure thus to present any such defense or objection constitutes a waiver, but the court for good cause shown may grant relief from the waiver. Lack of jurisdiction shall be noticed by the court at any time during the proceedings.

(d) All motions shall be in writing and signed by the moving party or his counsel, except those made orally by leave of court.

(e) A request for waiver of jurisdiction to the district court for criminal proceedings shall be in writing and filed within 28 days of the initial advisement. Upon application to the court by the district attorney, and for good cause shown, a request may, in the discretion of the court, be filed at any time prior to the adjudicatory trial.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Annotator's note. Since rule 3.2 is similar to rule 8 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures relevant cases construing that provision have been included in the annotations to this rule.

Must prove juvenile's age even if not specifically denied in pleadings. Where the petition in delinquency states the respondent's age and the responsive pleading does not deny the asserted age, although section 19-3-106 and this

rule specify that "jurisdictional matters of the age and residence of the child shall be deemed admitted unless specifically denied", the juvenile-defendant's age is not thereby admitted, and it is necessary to present evidence specifically on that issue. People in Interest of M.M., 41 Colo. App. 44, 582 P.2d 692 (1978).

Section not superseded by statutory procedure for waiving jurisdiction. This section is not superseded by the special statutory proce-

dures provided in section 19-3-106(4)(b), C.R.S. 1973 (1978 Repl. Vol. 8), for waiving jurisdiction of the juvenile court. *People v. District Court*, 199 Colo. 197, 606 P.2d 450 (1980).

Denial of request for waiver of jurisdiction to district court upheld. In the absence of

good cause to support the late filing by the people of a request for waiver of jurisdiction to the district court for criminal proceedings, the court is within its authority in denying the motion. *People v. District Court*, 199 Colo. 197, 606 P.2d 450 (1980).

Rule 3.3. Discovery

Disclosure by the prosecution and by the juvenile to the prosecution shall be governed by Crim. P. 16. "Prior criminal convictions" shall include juvenile adjudications.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Applied in *People in Interest of M.M.*, 41 Colo. App. 44, 582 P.2d 692 (1978) (decided under rule 9 as it existed prior to the 1988

repeal and reenactment of the rules of juvenile procedures).

Rule 3.4. Court Order for Nontestimonial Identification

Any request for a court order for nontestimonial identification shall be governed by Crim. P. 16 and Crim. P. 41.1.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 3.5. Jury Trial

(a) In any action in delinquency in which a juvenile is alleged to be an aggravated juvenile offender, as described in section 19-2-516, C.R.S. or is alleged to have committed an act that would constitute a crime of violence, as defined in section 18-1.3-406, C.R.S., if committed by an adult, the juvenile or the district attorney may demand a trial by a jury of not more than six persons except as provided in section 19-2-601(3)(a), C.R.S., or the court, on its own motion, may order a jury trial, with the exception that a juvenile is not entitled to a trial by jury when the petition alleges a delinquent act which is a misdemeanor, a petty offense, a violation of a municipal or county ordinance, or a violation of a court order. When requesting a jury trial pursuant to this rule, a juvenile is deemed to have waived the right to have an adjudicatory trial within 60 days and is subject instead to an adjudicatory trial within 6 months. Unless a jury is demanded pursuant to subsection (1) of section 19-2-107, C.R.S., it shall be deemed waived.

(b) Examination, selection, and challenges for jurors shall be as provided by C.R.C.P. 47, except that the grounds for challenge for cause shall be as provided by Crim. P. 24.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001; (a) amended and effective January 17, 2008.

ANNOTATION

Annotator's note. Since rule 3.5 is similar to rule 18 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures relevant cases construing that provision have been included in the annotations to this rule.

Trial by jury in the adjudicative stage of a juvenile proceeding is not required by the due process clause of the fourteenth amendment.

People in Interest of T.A.W., 38 Colo. App. 175, 556 P.2d 1225 (1976).

And six-member jury satisfies due process requirements. *People in Interest of T.A.W.*, 38 Colo. App. 175, 556 P.2d 1225 (1976).

Applied in *S.A.S. v. District Court*, 623 P.2d 58 (Colo. 1981).

Rule 3.6. Probation Revocation

Revocation of probation proceedings shall be governed by Crim. P. 32(f).

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Probation revocation petitions and delinquency petitions based on same acts. Where the district attorney files petitions to have a juvenile's probation revoked and then files delinquency petitions based on the same alleged acts, the court may dismiss the petitions for

revocation of probation without prejudice and order the prosecution to proceed on the delinquency petitions. *People in Interest of M.H.*, 661 P.2d 1173 (Colo 1983) (decided under rule 12 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure).

Rule 3.7. Detention

(a) The chief judge in each judicial district or the presiding judge of the Denver juvenile court shall designate a person(s) as officer(s) of the court with authority to determine whether a juvenile taken into temporary custody should be released to a parent, guardian, or other legal custodian, or admitted to a detention or shelter facility pending notification to the court and a detention hearing.

(b) The court shall maintain control over the admission, length of stay, and release of all juveniles placed in shelter or detention, except for admission into detention pursuant to Section 19-2-508 (3)(c), C.R.S.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (b) amended and adopted April 17, 1997, effective July 1, 1997.

Rule 3.8. Status Offenders

Juveniles alleged to have committed offenses which would not be a crime if committed by an adult (i.e., status offenses), shall not be detained for more than 24 hours excluding non-judicial days unless there has been a detention hearing and judicial determination that there is probable cause to believe the juvenile has violated a valid court order (JDF 560). A juvenile in detention alleged to be a status offender and in violation of a valid court order shall be adjudicated within 72 hours exclusive of non-judicial days of the time detained. A juvenile adjudicated of being a status offender in violation of a valid court order (JDF 561) may not be disposed to a secure detention or correctional placement unless the court has first reviewed a written report (JDF 562) prepared by a public agency which is not a court or law enforcement agency. The purpose of the report is to provide the court with useful information prior to sentencing. The report shall address the juvenile's behavior and the circumstances which brought the juvenile before the court and shall assess whether all less restrictive dispositions have been exhausted or are clearly inappropriate. The court is not bound by the recommendations contained in the report. The written report must be signed and dated either before or on the date the juvenile is sentenced to detention. Nothing herein shall prohibit the court from ordering the placement of juveniles in shelter care where appropriate, and such placement shall not be considered detention within the meaning of this rule. Juveniles alleged to have violated C.R.S. 18-12-108.5 or adjudicated delinquent for having violated C.R.S. 18-12-108.5 are exempt from the provisions of this rule.

COMMITTEE COMMENT

The reference to "valid court orders" is taken from the federal Juvenile Justice and Delinquency Prevention Act (JJDP) of 1974, as amended, which is found at 42 U.S.C.A. 5601 et seq. The Office of Juvenile Justice and Delinquency Prevention in April, 1995, issued final

regulations to implement that portion of the JJDP, as amended in 1992, which addresses the detention and secure confinement of status offenders. These regulations, which are found at 28 C.F.R. 31.303 (f)(3) set forth the legal requirements for issuing of "valid court orders,"

the violation of which by a status offender may, in certain circumstances, authorize juvenile courts to detain and/or commit such youth to secure confinement. The appendix to these rules contains a form for issuing a valid court order, a form order for making a secure placement disposition for violation of a valid court order, and a form for a written report to the court.

The Committee's intent in drafting this rule is not to encourage more frequent use of detention for status offenders. The Committee recognizes that Congress and the OJJDP assumed that courts would exhibit self-restraint and exercise the valid court order exclusion only in cases of status offenders who chronically fail to follow court orders. The Colorado supreme court in *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991) quoted from *In Re Ronald S.*, 9 Cal. App. 3D 866, 138 Cal. Rptr. 387 (1977) to comment on the use of secure confinement for status offenders.

Certainly not all [status offenders] need to be placed in secure facilities. However, some do and in these cases the juvenile court judge must have the authority to detain in a secure facility—if status offenders are to remain in the juvenile court. 69 Cal. App. 3d at 875, 138 Cal. Rptr. at 393.

Ohio Representative Ashbrook, who sponsored the valid court order amendment, stated that without the amendment courts would be limited in their ability to work with youths who continually flout the will of the court and that it would make "helping that young person much more difficult." (126 Cong. Rec. H. 10 10932). Ashbrook contemplated that the valid court order exception would primarily be used to provide treatment rather than punishment.

The Committee recommends that the Courts adopt this benevolent approach and use the valid court order exception to ensure that secure placements are used only for recalcitrant status offenders.

Runaways who are in violation of their probation do not fall under this rule.

Trial courts are encouraged to use the forms provided for in this rule and contained in the special forms index (JDF 560, JDF 561 and JDF 562). The order to secure placement as a disposition for violation of valid court order (JDF 561) must be signed and dated on the day the juvenile enters detention. When the provided forms are utilized, signed and dated properly, the court's order sentencing the status offender to detention complies with the requirements of the Juvenile Justice and Delinquency Prevention Act.

Source: Entire rule and committee comment added and adopted June 12, 1997, effective January 1, 1998; committee comment corrected November 19, 1997; committee comment amended and adopted December 14, 2000, effective January 1, 2001; entire rule and committee comment amended and effective February 21, 2008.

FORMS

(The following forms are available from the Colorado courts web page at
<http://www.courts.state.co.us/chs/court/forms/selfhelpcenter.htm>.)

SPECIAL FORM INDEX

- JDF 560. Valid Court Order for Status Offenders Pursuant to Colorado Rules of Juvenile Procedure 3.8 (Replaces Form 1)
- JDF 561. Secure Placement As Disposition for Violation of Valid Court Order Pursuant to Colorado Rules of Juvenile Procedure 3.8 (Replaces Form 2)
- JDF 562. Valid Court Order for Written Report Pursuant to Colorado Rules of Juvenile Procedure 3.8
-
-

Form JDF 560.**VALID COURT ORDER FOR STATUS OFFENDERS PURSUANT TO CRJP 3.8**

<input type="checkbox"/> District Court <input type="checkbox"/> Denver Juvenile Court <div style="text-align: right;">County, Colorado</div> Court Address: _____ The People of the State of Colorado, In the Interest of: Child(ren) and concerning _____ Parents(s)/Guardians(s) _____	<div style="text-align: center; border-top: 1px solid black; border-bottom: 1px solid black;"> ▲ COURT USE ONLY ▲ </div> Case Number: _____ <div style="display: flex; justify-content: space-between;"> Division _____ Courtroom _____ </div>
VALID COURT ORDER FOR STATUS OFFENDERS PURSUANT TO COLORADO RULES OF JUVENILE PROCEDURE 3.8	

This matter comes before the Court in the exercise of its jurisdiction provided by §19-1-104, C.R.S. upon petition _____ concerning the above-named child. This matter was heard before the Honorable _____, Judge/Magistrate of the Juvenile Court of _____ County, Colorado as an adjudicatory hearing on the above-cited petition which alleges that said child is a status offender as that term is defined in *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991) and 28 CFR Sec. 31.304(h).

I. A. Personally before the Court were:

B. Before the Court on service of process were:

C. Counsel present for the child was: _____

D. Upon testimony of the witnesses, the evidence received, reports received, statements and arguments of counsel, and the entire record, the Court finds:

1. that the child has within a reasonable time been served with a written copy of the charges;
2. that the child has been informed he/she has the right to a hearing on the matter before the Court;
3. that the child has been informed of the nature of this proceeding and the possible consequences associated with it;
4. that the child has been informed that he/she has a right to legal counsel and that counsel can be appointed at no charge to the child if the child is indigent and can not afford counsel;
5. that the child has been informed that he/she has the right to call witnesses in his/her own behalf and to confront and cross-examine witnesses against him/her;
6. that the child has been informed that he/she has a right to have a transcript or record of this proceeding;

7. that proof beyond a reasonable doubt exists that said child is guilty as charged of the allegations contained in the petition for the following reasons:

8. that the future conduct of the child should be regulated by requiring the child to do

(and/or) prohibiting said child from _____

9. that the child was warned that the child could be sanctioned for violating this Order and such sanction could include placement in a secure detention or correctional facility;
10. that a written copy of this Order should be provided to the child, the child's attorney, and the child's legal guardian;
11. that the child was informed that he/she has a right to appeal this Order; within the meaning of the Colorado Children's Code.

II. IT IS, THEREFORE ORDERED:

1. The child is required to: _____

until _____ (date) or until this injunction is modified or eliminated by subsequent Court Order.

2. The Respondent is required to: _____

until _____ (date) or until this mandatory injunction is modified or eliminated by subsequent Court Order.

3. The school, _____ is required to: _____

until _____ (date) or until this mandatory injunction is modified or eliminated by subsequent Court Order.

4. That the child shall immediately accompany _____ and receive a copy of this Order.

5. That the clerk office shall mail a copy of this Order to _____, the child's attorney and to _____, the child's legal guardian.

6. It is further ordered:

Date: _____

☐ Judge ☐ Magistrate

CERTIFICATE OF MAILING

I certify that on _____ (date), I hand-delivered/mailed this Order to the following:

- ☐ Prosecuting Party
- ☐ Juvenile/Child
- ☐ Attorney for Juvenile/Child
- ☐ Guardian ad Litem
- ☐ Parent(s)/Guardians(s)
- ☐ Probation Officer

Clerk

Form JDF 561.**SECURE PLACEMENT AS DISPOSITION FOR VIOLATION OF VALID COURT ORDER
PURSUANT TO CRJP 3.8**

<input type="checkbox"/> District Court <input type="checkbox"/> Denver Juvenile Court _____ County, Colorado Court Address: _____ The People of the State of Colorado, in the interest of: Child(ren) and concerning _____ Parents(s)/Guardians(s) _____	<div style="text-align: center; font-weight: bold;">▲ COURT USE ONLY ▲</div> Case Number: _____ Division _____ Courtroom _____
SECURE PLACEMENT AS DISPOSITION FOR VIOLATION OF VALID COURT ORDER PURSUANT TO COLORADO RULES OF JUVENILE PROCEDURE 3.8	

This matter comes before the Court in the exercise of its jurisdiction provided by §19-1-104, C.R.S. upon petition _____ concerning the above-named child. This matter was heard before the Honorable _____, Judge/Magistrate of the Juvenile Court of _____ County, Colorado on the petition which alleges that said child is in violation of a Valid Court Order (JDF 560) issued by this Court on _____ (date). Said child was previously adjudicated guilty on petition _____ and is a status offender as that term is defined in *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991) and 28 CFR Sec. 31.304(h).

I. A. Personally before the Court were:

B. Before the Court on service of process were:

C. Counsel present for the child was: _____**D. Upon testimony of the witnesses, the evidence received, reports received, statements and arguments of counsel, and the entire record, the Court finds:**

1. that the child has within a reasonable time been served with a written copy of the charges;
2. that the child has been informed he/she has the right to a hearing on the matter before the court;
3. that the child has been informed of the nature of this proceeding and the possible consequences associated with it;
4. that the child has been informed that he/she has a right to legal counsel and that counsel can be appointed at no charge to the child if the child is indigent and can not afford counsel;
5. that the child has been informed that he/she has the right to call witnesses in his/her own behalf and to confront and cross-examine witnesses against him/her;
6. that the child has been informed that he/she has a right to have a transcript or record of this proceeding;
7. that a probable cause hearing or adjudicatory hearing was held on _____ (date) at _____ (time) which is within 24 hours, excluding weekends and holidays, of the juvenile's placement in secure detention which occurred on _____ (date) at _____ (time);

8. that this violation hearing is within 72 hours, excluding weekends and holidays, of the juvenile's placement in secure detention which occurred on _____ (date);
9. that proof beyond a reasonable doubt exists that said child has violated the valid court order issued by the court on _____ (date) in the following respects:
- _____
- _____

10. that the Court has reviewed the written report (JDF 562) prepared by _____, a public agency independent of the court and law enforcement, has reviewed the account provided therein of the juvenile's behavior and the circumstances which brought the juvenile before the Court, and has reviewed the assessment of whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate;
11. that there is no less restrictive alternative appropriate to the needs of the juvenile and the community;
12. that the juvenile should be placed _____ to best serve the interests of the juvenile and the community;
13. that the child was informed he/she has a right to appeal this Order, within the meaning of the Colorado Children's Code.

II. It is, therefore Ordered:

1. That _____, who violated a valid court order, is placed _____ as the disposition of this Court.
2. It is further ordered:

Date: _____

☐ Judge ☐ Magistrate

Note: For this Order to be Valid, the Order must be signed either before or on the date the Juvenile is sentenced to Detention.

CERTIFICATE OF MAILING

I certify that on _____ (date), I hand-delivered/mailed this Order to the following:

- ☐ Prosecuting Party
- ☐ Juvenile/Child
- ☐ Attorney for Juvenile/Child
- ☐ Guardian ad Litem
- ☐ Parent(s)/Guardians(s)
- ☐ Probation Officer

Clerk

Form JDF 562.

VALID COURT ORDER WRITTEN REPORT PURSUANT TO CRJP 3.8

<input type="checkbox"/> District Court <input type="checkbox"/> Denver Juvenile Court _____ County, Colorado Court Address: _____ The People of the State of Colorado, In the Interest of: _____ Child(ren) and concerning _____ Parents(s)/Guardians(s)	<div>▲ COURT USE ONLY ▲</div> <div>Case Number: _____</div> <div>Division Courtroom</div>
VALID COURT ORDER FOR WRITTEN REPORT PURSUANT TO COLORADO RULES OF JUVENILE PROCEDURE 3.8	

This Written Report is being submitted to the Court as ordered on _____ (date) prior to the violation hearing scheduled on _____ (date) at _____ (time).

The report was prepared on _____ (date) by:
Name: _____ Title: _____
Name of Agency: _____

The report has been prepared clearly and concisely to benefit the Court. In entering any order that directs or authorizes the placement of a status offender in a secure facility the Judge/Magistrate presiding over an initial probable cause hearing or violation hearing must determine that all the elements of the Valid Court Order for Status Offenders (JDF 560) and applicable due process rights were afforded the Juvenile and in the case of a violation hearing the Judge/Magistrate must obtain and review this written report that:

1. Reviews the behavior of the Juvenile and the circumstances under which the Juvenile was brought before the Court and made subject to such an order. For example, describe the behavior(s) of the Juvenile and why the case was referred to the Court. Please be as specific as possible. Attach additional pages as needed.
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____

2. Determines the reasons for the Juvenile's behavior. For example, describe who you have interviewed to determine the reasons, what tests/assessment have been conducted, what the Juvenile has said, what teachers/agencies have stated. Please be as specific as possible. Attach additional pages as needed.

[illegible]

3. Determines whether all dispositions, other than secure confinement, have been exhausted or are clearly inappropriate. Please list all alternatives that have been tried and failed and list all alternatives that have not been tried but are clearly inappropriate.

[illegible]

Date: _____

Signature

Note: The written report must be signed and dated either before or on the date the juvenile is sentenced to detention. The purpose of the report is to provide the court with useful information prior to sentencing.

CERTIFICATE OF MAILING

I certify that on _____ (date), I hand-delivered/mailed this Written Report to the following:

- ☐ Prosecuting Party
- ☐ Juvenile/Child
- ☐ Attorney for Juvenile/Child
- ☐ Guardian ad Litem
- ☐ Parent(s)/Guardians(s)
- ☐ Probation Officer

Signature _____

PART FOUR — DEPENDENCY AND NEGLECT**Rule 4. Petition Initiation, Form and Content**

(a) A petition concerning a child who is alleged to be dependent and neglected shall be initiated in accordance with Section 19-3-501, C.R.S., and shall be in the form set forth in Section 19-3-502, C.R.S. Said petition shall be filed within 14 days from the day a child is taken into custody, unless otherwise directed by the court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Annotator's note. Since rule 4 is similar to rule 7 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure, a relevant cases construing that provision has been included in the annotations to this rule.

Failure of attorney representing county department of social services to sign verified dependency petition held to be harmless error. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

Failure to file a dependency and neglect petition within prescribed time does not result in release of child absent a motion by an interested party, and even release of the child does not affect the right to file a dependency and neglect petition. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

Rule 4.1. Responsive Pleadings and Motions

(a) No written responsive pleadings are required. Jurisdictional matters of age and residence of the child which shall be deemed admitted unless specifically denied.

(b) Any defense or objection which is capable of determination without trial of the general issues may be raised by motion.

(c) Defenses and objections based on defects in the institution of the action or in the petition, other than it fails to show jurisdiction in the court, shall be raised only by motion filed prior to the entry of an admission or denial of the allegations of the petition. Failure to present any such defense or objection constitutes a waiver, but the court for good cause shown may grant relief from the waiver. Lack of jurisdiction shall be noticed by the court at any time during the proceeding.

(d) All motions shall be in writing and signed by the moving party or counsel, except those made orally by leave of court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 8 on responsive pleadings and motions, see the annotations under rule 3.2.

Rule 4.2. Advisement — Dependency and Neglect

(a) At the first appearance before the court, the respondent(s) shall be fully advised by the court as to all rights and the possible consequences of a finding that a child is dependent or neglected. The court shall make certain that the respondent(s) understand the following:

- (1) The nature of the allegations contained in the petition;
- (2) As a party to the proceeding, the right to counsel;
- (3) That if the respondent(s) is a parent, guardian, or legal custodian, and is indigent, the respondent may be assigned counsel as provided by law.

- (4) The right to a trial by jury;
 - (5) That any admission to the petition must be voluntary;
 - (6) The general dispositional alternatives available to the court if the petition is sustained, as set forth in Section 19-3-508, C.R.S.;
 - (7) That termination of the parent-child legal relationship is a possible remedy which is available if the petition is sustained;
 - (8) That if a motion to terminate the parent-child legal relationship is filed, the court will set a separate hearing at which the allegations of the motion must be proven by clear and convincing evidence;
 - (9) That termination of the parent-child legal relationship means that the subject child would be available for adoption;
 - (10) That any party has the right to appeal any final decision made by the court; and
 - (11) That if the petition is admitted, the court is not bound by any promises or representations made by anyone about dispositional alternatives selected by the court.
- (b) The respondent(s), after being advised, shall admit or deny the allegations of the petition.
- (c) If a respondent(s) admits the allegations in the petition, the court may accept the admission after making the following finding:
- (1) That the respondent(s) understand his or her rights, the allegations contained in the petition, and the effect of the admission;
 - (2) That the admission is voluntary.
- (d) Notwithstanding any provision of this Rule to the contrary, the court may advise a non-appearing respondent(s) pursuant to this Rule in writing and may accept a written admission to the petition if the respondent has affirmed under oath that the respondent(s) understands the advisement and the consequences of the admission, and if, based upon such sworn statement, the court is able to make the findings set forth in part (c) of this Rule.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 3 on advisement, see the annotations under rule 3.

Rule 4.3. Jury Trial

(a) At the time the allegations of a petition are denied, a respondent, petitioner, the court, or guardian ad litem may demand a jury of not more than six. Unless a jury is demanded, it shall be deemed waived.

(b) Examination, selection, and challenges for jurors in such cases shall be as provided by C.R.C.P. 47, except that the petitioner, all respondents, and the guardian ad litem shall be entitled to three peremptory challenges. No more than nine peremptory challenges are authorized.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 18 on the right to a jury trial, see the annotations under rule 3.5.

Rule 4.4. Certification of Custody Matters to Juvenile Court

(a) Any party to a dependency or neglect action who becomes aware of any other proceeding in which the custody of a subject child is at issue shall file in such other

proceedings a notice that an action is pending in juvenile court together with a request that such other court certify the issue of legal custody to the juvenile court pursuant to Section 19-1-104(4) and (5), C.R.S.

(b) When the custody issue is certified to the juvenile court, a copy of the order certifying the issue to juvenile court shall be filed in the dependency or neglect case.

(c) When the juvenile court enters a custody order pursuant to the certification, a certified copy of such custody order shall be filed in the certifying court. Such order shall thereafter be the order of the certifying court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 4.5. Contempt in Dependency and Neglect Cases

The citation, copy of the motion, affidavit, and order in contempt proceedings pursuant to C.R.C.P. 107, shall be served personally upon any respondent or party to the dependency and neglect action, at least 14 days before the time designated for the person to appear before the court. Proceedings in contempt shall be conducted pursuant to C.R.C.P. 107, except that the time for service under subsection (c) shall be not less than 14 days before the time designated for the person to appear.

Source: Entire rule and committee comment added and adopted December 14, 2000, effective January 1, 2001; entire rule amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The old rule read twenty days; however, given the new time constraints imposed by other statutes and policies in dependency and neglect cases, contempt proceedings should be dealt

with accordingly. The committee believes that this will not infringe upon the respondents' ability to respond. Respondents' counsel can always request more time in exceptional cases.

PART FIVE — UNIFORM PARENTAGE ACT

(No Rule)

PART SIX — ADOPTION AND RELINQUISHMENT

Rule 6. Petition in Adoption

(a) Every petition in adoption shall be verified and shall include the following information:

- (1) All information required by Section 19-5-208, C.R.S.;
 - (2) A statement detailing why venue is proper;
 - (3) A statement as to the factual basis of the child's availability for adoption;
 - (4) The name of the person or agency placing the child in the home of petitioner(s) and the date of such placement. If placement is pursuant to court order, a copy of that order shall be attached to the petition;
 - (5) If the petition is for a designated adoption, a complete statement as to the facts surrounding the designation;
 - (6) A statement by petitioner(s) of any fee charged relative to the adoption and any charges, gifts, charitable contributions, medical expenses, or other consideration or thing of value as may be subject to the approval of the court; and
 - (7) A statement as to what, if any, additional charges, gifts, charitable contributions, medical expenses, or other consideration or thing of value that are anticipated to be paid.
- (b) At least 14 days prior to the hearing on the petition, petitioner(s) shall file with the court the following documentation:
- (1) All documents concerning the child's availability for adoption;

(2) The consent for adoption and report for adoption, as set forth in Section 19-5-207, C.R.S.;

(3) Where adoption of a foreign-born child is sought, the parties must present certified copies of the original documents with certified translations of the documents adjudicating the child as available for adoption;

(4) A statement of fees by counsel itemizing the hourly rate, services provided, and time spent on the case. A statement of fees in any agency adoption shall detail the services provided; and

(5) The report of the county department of social services or licensed child placement agency, as required by law.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001; IP(b) amended and adopted December 14, 2011, effective July 1, 2012.

Rule 6.1. Service by Publication

Affidavits in support of motions for service by publication shall be governed by C.R.C.P. 4(h), and shall include a detailed statement of the specific efforts made to locate an absent parent. A single publication is sufficient.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 6.2. Decree in Adoption

(a) Every decree in adoption shall be in conformance with the Colorado Children's Code, and shall include, but not be limited to:

(1) The name(s) of the adoptive parent(s);

(2) A finding that the court has jurisdiction over the parties and the subject matter of the petition;

(3) A finding that the child is available for adoption; that written consents of all persons, as provided by law, are on file with the court and are valid; that the rights of all parents, whether known or unknown, have been terminated or that such parents have been given notice of a right to a hearing on fitness, pursuant to Section 19-3-102, C.R.S.;

(4) A finding that if the termination of parental rights of any party in interest was an issue, the party has been given notice in the time and in the manner provided by law and these Rules; that the party has appeared or is in default; that parental rights should be and are terminated and the reason(s) therefor;

(5) A finding that the petitioner(s) are of good moral character, able to support and educate the child, and have a suitable home;

(6) A finding that the child's mental and physical condition is such that the child is a proper subject for adoption by the petitioner(s); and

(7) The name to be given the child.

(b) The former name of the child shall not be stated in the final decree, pursuant to Section 19-5-210 (3), C.R.S.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

Rule 6.3. Relinquishment

(1) Every petition in relinquishment shall contain the following:

(a) All information required by Section 19-5-103, C.R.S.;

(b) A statement as to venue being proper; and

(c) A statement if the relinquishment is part of a designated adoption, with particular details as to the designation and whether any fees or costs are being paid by the prospective adoptive parent(s).

(2) Prior to the hearing on relinquishment, a copy of a report shall be filed with the court by a county department of social services or licensed child placement agency detailing the counseling provided to the petitioner(s).

(3) Any motion for service by publication of an absent parent shall be governed by C.R.C.P. 4(h), and an affidavit must accompany the motion detailing what steps have been taken to determine the whereabouts of the absent parent. A single publication is sufficient.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

PART SEVEN — SUPPORT

(No Rule)

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CHAPTER 29

**The Colorado
Rules of Criminal Procedure
For All Courts of Record
In Colorado**

N.B. These rules do not apply to Municipal Ordinance and Charter violations.

**Adopted by the
SUPREME COURT OF COLORADO**

**November 29, 1973,
Effective April 1, 1974,
and as Amended**

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CHAPTER 29

COLORADO RULES OF CRIMINAL PROCEDURE

I. SCOPE, PURPOSE, AND CONSTRUCTION

Rule 1. Scope

These Rules govern the procedure in all criminal proceedings in all courts of record with the exceptions stated in Rule 54.

ANNOTATION

Law reviews. For article on the Rules of Criminal Procedure, see 34 Rocky Mt. L. Rev. 1 (1961). For article, "1963 Amendments to Colorado Rules of Criminal Procedure", see 35 U. Colo. L. Rev. 303 (1963).

Rules of criminal procedure must be read in pari materia. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Rule 2. Purpose and Construction

These Rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

II. INITIATION OF PRELIMINARY FELONY PROCEEDINGS

Rule 3. The Felony Complaint

(a) The felony complaint shall be a written statement of the essential facts constituting the offense charged, signed by the prosecutor and filed in the court having jurisdiction over the offense charged.

(b) Repealed.

Source: Amended and adopted September 4, 1997, effective January 1, 1998; (a) amended and adopted November 22, 2006, effective January 1, 2007.

ANNOTATION

Applied in People v. Stoppel, 637 P.2d 384 (Colo. 1981); People v. Abbott, 638 P.2d 781 (Colo. 1981).

Rule 4. Warrant or Summons Upon Felony Complaint

(a) Issuance.

(1) Upon the filing of a felony complaint in the county court, the prosecuting attorney shall request the court to order that a warrant shall issue for the arrest of the defendant, or that summons shall issue and be served upon the defendant.

(2) If a warrant is requested, the felony complaint must contain or be accompanied by a sworn statement of facts establishing probable cause to believe that a criminal offense **has been committed, and that the offense was committed** by the person for whom the warrant is sought. In lieu of such a sworn statement, the felony complaint may be

supplemented by sworn testimony of such facts. Such testimony must be transcribed and then signed under oath by the witness giving the testimony.

(3) Except in class 1, class 2, and class 3 felonies, and in unclassified felonies punishable by a maximum penalty of more than ten years, whenever a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court, with the consent of the prosecuting attorney, shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.

(4) Except in class 1, class 2, and class 3 felonies, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant except where there is reasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

- (I) The defendant's residence;
- (II) The defendant's employment;
- (III) The defendant's family relationships;
- (IV) The defendant's past history of response to legal process; and
- (V) The defendant's past criminal record.

(5) If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for his arrest.

(6) When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) Form.

(1) **Warrant.** The arrest warrant shall be a written order issued by a judge of a court of record directed to any peace officer and shall:

(I) State the defendant's name or if that is unknown, any name or description by which he can be identified with reasonable certainty;

(II) Command that the defendant be arrested and brought without unnecessary delay before the nearest available judge of a county or district court;

(III) Identify the nature of the offense;

(IV) Have endorsed upon it the amount of bail if the offense is bailable; and

(V) Be signed by the issuing county judge.

(2) **Summons.** If a summons is issued in lieu of a warrant pursuant to this Rule, the summons shall:

(I) Be in writing;

(II) State the name of the person summoned and his address;

(III) Identify the nature of the offense;

(IV) State the date when issued and the county where issued;

(V) Be signed by the judge or clerk of the court with the title of his office; and

(VI) Command the person to appear before the court at a certain time and place.

(c) Execution or Service and Return.

(1) Warrant.

(I) **By Whom.** The warrant may be executed by any peace officer.

(II) **Territorial Limits.** The warrant may be executed anywhere within Colorado.

(III) **Manner.** The warrant shall be executed by arresting the defendant. The officer need not have the warrant in his possession at the time of arrest, but if he has the warrant at that time he shall show it to the defendant immediately upon request. If the officer does not have the warrant in his possession at the time of arrest, he shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request he shall show the warrant to the defendant as soon as possible.

(IV) **Return.** The peace officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing county judge and cancelled by him. At the request of the prosecuting attorney, made while a complaint is pending, a warrant returned unexecuted and not

cancelled, or a duplicate thereof, may be delivered by the county judge to any peace officer or other authorized person for execution.

(2) **Summons.**

(I) **By Whom.** The summons may be served by any person authorized to effect service in a civil action.

(II) **Territorial Limits.** The summons may be served anywhere within Colorado.

(III) **Manner.** A summons issued pursuant to this Rule may be served in the same manner as the summons in a civil action or by mailing it to the defendant's last known address, not less than 14 days prior to the time the defendant is required to appear, by registered mail with return receipt requested or certified mail with return receipt requested. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. The summons for the appearance of a corporation may be served by a peace officer in the manner provided for service of summons upon a corporation in a civil action.

(IV) **Return.** At least one business day prior to the return day, the person to whom a summons has been delivered for service shall make return thereof to the county court before whom the summons is returnable. At the request of the prosecuting attorney, made while a complaint is pending, a summons returned unserved, or a duplicate thereof, may be delivered by the county judge to any peace officer or other authorized person for service.

Source: (c)(2)(III) amended and adopted October 15, 2009, effective January 1, 2010; (c)(2)(III) and (c)(2)(IV) amended and adopted December 14, 2011, effective July 1, 2012.

Cross references: For service of a summons in a civil action, see C.R.C.P. 4.

ANNOTATION

I. General Consideration.

II. Issuance.

III. Execution.

I. GENERAL CONSIDERATION.

Applied in *People v. Kelderman*, 44 Colo. App. 487, 618 P.2d 723 (1980).

II. ISSUANCE.

Probable cause necessary for issuance of warrant. To support the issuance of an arrest warrant, the complaint must comply with the probable cause requirements of the fourth amendment to the United States constitution, § 7 of art. II, Colo. Const., and this rule. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

And the existence of probable cause must be determined by member of the judiciary, rather than by a law enforcement officer who is employed to apprehend criminals and to bring charges against those who choose to violate the law. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

Judge not to accept mere conclusion of complainant. In determining whether or not probable cause exists, a judge should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

But should require and examine underlying facts. Before a warrant for arrest can be issued, the judicial officer issuing such a warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

A complaint standing alone will not support an arrest warrant where no facts are set forth to establish probable cause. *Sargent v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

So judge may require supplemental sworn testimony or amendment of complaint. Should the judge to whom application has been made for the issuance of an arrest warrant determine that the complaint is insufficient, he can require that sworn testimony be offered to supplement the complaint or that the complaint be amended to set forth additional facts if an arrest warrant is to be issued. And under § 7 of art. II, Colo. Const., any testimony taken to supplement the complaint must be reduced to writing and signed by the witness or witnesses who offer the testimony under oath. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

Warrant and supporting affidavits may overcome insufficiency of complaint. Where federal warrants are supported by affidavits which square with all constitutional requirements, they provide a legitimate basis for an arrest, notwithstanding the insufficiency of the complaint to support an arrest warrant. *Sargent v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

III. EXECUTION.

There are no constitutional requirements dictating that an arrest warrant be executed at the earliest opportunity. *People v. Nisser*, 189 Colo. 471, 542 P.2d 84 (1975).

Nor does this rule contain limitations regarding the time within which an arrest warrant must be executed. *People v. Nisser*, 189 Colo. 471, 542 P.2d 84 (1975).

No abuse of process where delay in service not prejudicial. Where the record contains no evidence that the delay in the service of an arrest warrant was intended to prejudice the defendant — or that defendant was, in fact, prejudiced by the six-day postponement of her arrest, but on the other hand, uncontroverted evidence indicates that the delay was caused by the perceived need to protect the identity of an undercover agent in a collateral investigation, the delay in the service of the arrest warrant

was not an abuse of process. *People v. Nisser*, 189 Colo. 471, 542 P.2d 84 (1975).

Where and by whom execution authorized. Arrest warrants are not territorially limited and, therefore, may be executed anywhere in Colorado by an officer with authority to arrest in the particular jurisdiction in which the person named in the warrant is found. *People v. Hamilton*, 666 P.2d 152 (Colo. 1983).

Arresting officers are not required to have arrest warrants with them at the time of arrest. *Sargent v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

And execution by unauthorized person immaterial if authorized person present. It is immaterial who executes an arrest warrant provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process. *People v. Schultz*, 200 Colo. 47, 611 P.2d 977 (1980).

Rule 4.1. County Court Procedure — Misdemeanor and Petty Offense — Warrant or Summons Upon Complaint

Where the offense charged is a misdemeanor or petty offense, the action may be commenced in the county court as provided below in this Rule. This Rule shall have no application to misdemeanors or petty offenses prosecuted in other courts or to felonies.

(a) Definitions.

(1) "Complaint" means a written statement charging the commission of a crime by an alleged offender filed in the county court.

(2) Repealed.

(3) "Summons" means a written order or notice directing that a person appear before a designated county court at a stated time and place and answer to a charge against him.

(4) "Summons and complaint" means a document combining the functions of both a summons and a complaint.

(b) Initiation of the Prosecution.

(1) Prosecution of a misdemeanor or petty offense may be commenced in the county court by:

(I) The issuance of a summons and complaint;

(II) The issuance of a summons following the filing of a complaint;

(III) The filing of a complaint following an arrest;

(IV) The filing of a summons and complaint following arrest; or

(V) In the event that the offense is a class 2 petty offense, by the issuance of a notice of penalty assessment pursuant to statute.

(c) Summons, Summons and Complaint.

(1) **Summons.** A summons issued by the county court in a prosecution for a misdemeanor or a class 1 petty offense may be served by giving a copy to the defendant personally, or by leaving a copy at the defendant's usual place of abode with some person over the age of eighteen years residing therein, or by mailing a copy to the defendant's last known address not less than 14 days prior to the time the defendant is required to appear by registered mail with return receipt requested or certified mail with return receipt requested. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. Personal service shall be made by a peace officer or any disinterested party over the age of eighteen years.

(2) Repealed.

(3) **Summons and Complaint.** A summons and complaint may be issued by any peace officer for an offense constituting a misdemeanor or a petty offense:

(I) Committed in his presence; or

(II) If not committed in his presence, which he has probable cause to believe was committed and probable cause to believe was committed by the person charged.

Except for penalty assessment notices which shall be handled according to the procedures set forth in section 16-2-201 and subsection (e) of this Rule, a copy of the summons and complaint shall be filed immediately with the county court before which appearance is required and a second copy shall be given to the district attorney or his deputy for such county.

(4) **Content of Summons and Complaint.** A summons and complaint issued by a peace officer shall contain the name of the defendant, shall identify the offense charged, including a citation of the statute alleged to have been violated, shall contain a brief statement or description of the offense charged, including the date and approximate location thereof, and shall direct the defendant to appear before a specified county court at a stated time and place.

(d) **Arrest followed by a Complaint.** If a peace officer makes an arrest without a warrant of a person for a misdemeanor or a petty offense, the arrested person shall be taken without unnecessary delay before the nearest available county or district judge. Thereafter, a complaint shall be filed immediately in the county court having jurisdiction of the offense and a copy thereof given to the defendant at or before the time he is arraigned. The provisions of this Rule are subject to the right of the arresting authority to release the arrested person pursuant to section 16-3-105.

(e) **Penalty Assessment Procedure.**

(1) When a person is arrested for a class 2 petty offense, the arresting officer may either give the person a penalty assessment notice and release him upon its terms, or take him before a judge of the county court in the county in which the alleged offense occurred. The choice of procedures shall be based upon circumstances which reasonably persuade the officer that the alleged offender is likely or unlikely to comply with the terms of the penalty assessment notice.

(2) The penalty assessment notice shall be a summons and complaint containing identification of the alleged offender, specification of the offense and applicable fine, a requirement that the alleged offender pay the fine or appear to answer the charge at a specified time and place, that payment of the specified fine without an appearance is an acknowledgment of guilt, and that an appearance must be made or the specified fine paid on or before a certain date or a bench warrant will issue for the offender's arrest. In traffic cases, the penalty assessment notice shall also advise the traffic offender of the immediate consequences of payment of the specified fine without an appearance.

(3) In traffic cases, a duplicate copy of the notice shall be sent by the officer to the Colorado department of revenue, motor vehicle division, Denver, Colorado. In all cases, a duplicate copy shall be sent to the clerk of the county court in the county in which the alleged offense occurred.

(4) If the person given a penalty assessment notice chooses to acknowledge his guilt, he may pay the specified fine in person or by mail at the place and within the time specified in the notice. If he chooses not to acknowledge his guilt, he shall appear as required in the notice. Upon trial, if the alleged offender is found guilty, the fine imposed shall be that specified in the notice for the offense of which he was found guilty, but customary court costs may be assessed against him in addition to such fine.

(f) **Failure to Appear.** If a person upon whom a summons or summons and complaint has been served pursuant to this Rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for his arrest. In the case of a penalty assessment notice, if the person to whom a penalty assessment notice has been served pursuant to this Rule fails to appear in person or by counsel, or if he fails to pay the specified fine at a specified time and place, a bench warrant may issue for his arrest.

Source: (a) amended March 15, 1985, effective July 1, 1985; (f) amended June 9, 1988, effective January 1, 1989; entire rule amended and adopted May 27, 2004, effective July 1, 2004; (c)(1) amended and adopted October 15, 2009, effective January 1, 2010; (c)(1) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Summons, Summons and Complaint.

I. GENERAL CONSIDERATION.

Applied in *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *May v. People*, 636 P.2d 672 (Colo. 1981); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

II. SUMMONS, SUMMONS AND COMPLAINT.

Minimum requirements of a summons and complaint under this rule are: (1) The name of the defendant, (2) the offense charged, (3) a citation of the statute alleged to have been violated, (4) a brief statement or description of the offense charged, including the date and approximate location thereof, and (5) the direction that the defendant appear before a specified county court at a stated date, time, and place. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971). See *Stubert v. County Court*, 163 Colo. 535, 433 P.2d 97 (1967).

General assembly did not intend that such a summons and complaint be verified. *Stubert v. County Court*, 163 Colo. 535, 433 P.2d 97 (1967); *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

Only peace officers may sign. The only persons designated as having the authority to sign such a summons and complaint are peace officers. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

It is sufficient that the summons form alleges that complainant "knows or believes", rather than stating more formally that he "knows or has reason to believe", that the accused committed the offense charged. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

Prosecution for a misdemeanor charge was properly initiated in accordance with subsection (d) of this rule when the defendant posted bail and executed his appearance bond, thereby waiving service of the complaint on him until his appearance date. This procedure also complies with § 16-2-112 and related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time he is arraigned. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

Rule 4.2. Arrest Warrant Without Information, Felony Complaint, or Complaint

If a warrant for arrest is sought prior to the filing of an information, felony complaint, or complaint, such warrant shall issue only on affidavit sworn to or affirmed before the judge, or a notary public and determined by a judge to relate facts sufficient to establish probable cause that an offense has been committed and probable cause that a particular person committed that offense. A warrant may be obtained by facsimile transmission (FAX) or electronic transmission pursuant to procedures set forth in Rule 41, in which event the procedure in Rule 41 shall be followed. The court shall issue a warrant for the arrest of such person commanding any peace officer to arrest the person so named and to take the person without unnecessary delay before the nearest judge of a court of record.

COMMITTEE COMMENT

This rule is intended to facilitate the issuance of warrants by eliminating the need to physi-

cally carry the supporting affidavit to the judge (see Section 16-1-106, C.R.S.).

Source: Entire rule amended July 16, 1992, effective November 1, 1992; entire rule amended and effective September 9, 2004; entire rule amended and effective February 10, 2011.

ANNOTATION

This rule is codification of § 7 of art. II, Colo. Const. *People v. Kelderman*, 44 Colo. App. 487, 618 P.2d 723 (1980).

Applied in *People v. Schultz*, 200 Colo. 47, 611 P.2d 977 (1980).

Rule 5. Preliminary Proceedings**(a) Felony Proceedings.**

(1) **Procedure Following Arrest.** If a peace officer or any other person makes an arrest, either with or without a warrant, the arrested person shall be taken without unnecessary delay before the nearest available county or district court. Thereafter, a felony complaint, information, or indictment shall be filed, if it has not already been filed, without unnecessary delay in the proper court and a copy thereof given to the defendant.

(2) **Appearance Before the Court.** At the first appearance of the defendant in court, it is the duty of the court to inform the defendant and make certain that the defendant understands the following:

(I) The defendant need make no statement and any statement made can and may be used against the defendant.

(II) The right to counsel;

(III) If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held;

(IV) Any plea the defendant makes must be voluntary and not the result of undue influence or coercion;

(V) The right to bail, if the offense is bailable, and the amount of bail that has been set by the court;

(VI) The nature of the charges;

(VII) The right to a jury trial;

(VIII) The right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged was committed by the defendant.

(3) **Appearance in the Court not Issuing the Warrant.** If the defendant is taken before a court which did not issue the arrest warrant, the court shall inform the defendant of the matters set out in subsection (a)(2) of this Rule and, allowing time for travel, set bail returnable not less than 14 days thereafter before the court which issued the arrest warrant, and shall transmit forthwith all papers in the case to the court which issued the arrest warrant. In the event the defendant does not make bail within forty-eight hours, the sheriff of the county in which the arrest warrant was issued shall return the defendant to the court which issued the warrant.

(4) **Preliminary Hearing — County Court Procedures.** Every person accused of a class 1, 2, or 3 felony in a felony complaint has the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony by felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S., shall have the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony who is not entitled to a preliminary hearing shall, unless otherwise waived, participate in a dispositional hearing for the purposes of case evaluation and potential resolution. The following procedures shall govern the holding of a preliminary hearing:

(I) Within 7 days after the defendant is brought before the county court, either the prosecutor or the defendant may request a preliminary hearing. Upon such request, the court forthwith shall set the hearing. The hearing shall be held within 35 days of the day of setting, unless good cause for continuing the hearing beyond that time is shown to the court. The clerk of the court shall prepare and give notice of the hearing, or any continuance thereof, to all parties and their counsel.

(II) The preliminary hearing shall be held before a judge of the county court in which the criminal action has been filed. The defendant shall not be called upon to plead. The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The judge presiding at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(III) If the county court determines such probable cause exists or if the case is not otherwise resolved pursuant to a dispositional hearing if no preliminary hearing was held, it shall order the defendant bound over to the appropriate court of record for trial. In appropriate cases, the defendant may be admitted to or continued on bail by the county court, but bond shall be made returnable in the trial court and at a day and time certain. All county court records, except the reporter's transcript notes, or recording, shall be transferred forthwith by the clerk of the county court to the clerk of the appropriate court of record.

(IV) If from the evidence it appears to the county court that there is not probable cause to believe that any or all of the offenses charged were committed by the defendant, the county court shall dismiss those counts from the complaint and, if all counts are dismissed, discharge the defendant. Upon a finding of no probable cause, the prosecution may appeal pursuant to Rule 5(a)(4)(V), file a direct information pursuant to Rule 5(a)(4)(VI) charging the same offense(s), or submit the matter to a grand jury, but may not file a subsequent felony complaint charging the same offenses.

(V) If the prosecutor believes the court erred in its finding of no probable cause, the prosecutor may appeal the ruling to the district court. The appeal of such final order shall be conducted pursuant to the procedures for interlocutory appeals in Rule 37.1 of these rules. Such error, if any, shall not constitute good cause for refileing.

(VI) Upon a finding of no probable cause as to any one or more of the offenses charged in a felony complaint, the prosecution may file a direct information in the district court pursuant to Rule 7(c)(2) charging the same offense(s). If the prosecutor states an intention to proceed in this manner, the bond executed by the defendant shall be continued and returnable in the district court at a day and time certain. If a bond has not been continued, the defendant shall be summoned into court without the necessity of making a new bond.

(VII) If a felony complaint is dismissed prior to a preliminary hearing being held when one is required or, in other cases, prior to being bound over, the prosecution may thereafter file a direct information in the district court pursuant to Rule 7(c)(4) charging the same offense(s), file a felony complaint in the county court charging the same offense(s), or submit the matter to a grand jury. If the prosecution files a subsequent felony complaint charging the defendant with the same offense(s), the felony complaint shall be accompanied by a written statement from the prosecutor providing good cause for dismissing and refileing the charges. Within 21 days of defendant's first appearance following the filing of the new felony complaint the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(VIII) If the county court has bound over the defendant to the district court and the case is thereafter dismissed in the district court before jeopardy has attached, the prosecution may file a direct information in the district court pursuant to Rule 7(c)(5) charging the same offense(s), file a felony complaint in county court charging the same offense(s), or submit the matter to a grand jury, and the case shall then proceed as if the previous case had never been filed. The prosecution shall also file with the felony complaint or the direct information a statement showing good cause for dismissing and then refileing the case.

Within 21 days of defendant's first appearance following the filing of the new felony complaint or the direct filing of the new information the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(4.5) A dispositional hearing is an opportunity for the parties to report to the court on the status of discussions toward disposition, including presenting any resolution pursuant to C.R.S. 16-7-302. The court shall set the dispositional hearing at a time that will afford the parties an opportunity for case evaluation and potential resolution.

(5) **Procedure Upon Failure to Request Preliminary Hearing.** If the defendant or prosecutor fails to request a preliminary hearing within 7 days after the defendant has come before the court, the county court shall forthwith order the defendant bound over to the appropriate court of record for trial. In no case shall the defendant be bound over for trial to another court until the preliminary hearing has been held, or until the 7-day period for requesting a preliminary hearing has expired. In appropriate cases, the defendant may be admitted to, or continued upon bail by the county court, but bond shall be made returnable in the trial court at a day and time certain. All court records in the case, except the reporter's transcript, notes, or recording shall be transferred forthwith by the clerk to the appropriate court of record.

(b) **Bail in Absence of a County Judge.** If no county judge is immediately available to set bond in the case of a person in custody for the commission of a bailable felony, any available district judge may set bond, or such person may be admitted to bail pursuant to Rule 46.

(c) **Misdemeanor and Petty Offense Proceedings.**

(1) **Procedure Following Arrest.** If a peace officer or any other person makes an arrest, either with or without a warrant, the arrested person shall be taken without unnecessary delay before the nearest available county court. Thereafter a complaint or summons and complaint shall be filed, if it has not already been filed, immediately in the proper court and a copy thereof given to the defendant at or before arraignment. Trial may be held forthwith if the court calendar permits, immediate trial appears proper, and the parties do not request a continuance for good cause. Otherwise the case shall be set for trial as soon as possible.

(2) **Appearance Before the Court.** At the first appearance in the county court the defendant shall be advised in accordance with the provisions set forth in subparagraphs (a) (2) (I) through (VII) of this Rule, except that the defendant shall be advised that an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7-301 (4) (a).

(3) **Appearance in the County Court not Issuing the Warrant.** If the defendant is taken before a county court which did not issue the arrest warrant, the court shall inform the defendant of the matters set out in subsection (a)(2)(I through VII) of this Rule and, allowing time for travel, set bail returnable not less than 14 days thereafter before the court which issued the arrest warrant, and shall transmit forthwith a transcript of the proceedings and all papers in the case to the court which issued the arrest warrant. In the event the defendant does not make bail within forty-eight hours, the sheriff of the county in which the arrest warrant was issued shall return the defendant to the court which issued the warrant.

Source: Entire rule amended March 31, 1988, effective January 1, 1989; IP(a)(4) and (a)(4)(III) amended and (a)(4.5) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted September 12, 2000, effective January 1, 2001; (a)(3) amended January 11, 2001, effective July 1, 2001; entire rule amended and adopted June 27, 2002, effective July 1, 2002; (a)(4) amended and effective January 17, 2008; (a)(3), (a)(4)(I), (a)(4)(VII), (a)(4)(VIII), (a)(5), and (c)(3) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Procedure Following Arrest.
- III. Appearance Before Court.
- IV. Preliminary Hearing.
- V. Failure to File for Preliminary Hearing.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Police Interrogation in Colorado: The Implementation of Miranda", see 47 Den. L.J. 1 (1970). For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Felony Preliminary Hearings in Colorado", see 17 Colo. Law. 1085 (1988). For article, "The Use of 'No Bond' Holds in Colorado", see 32 Colo. Law. 81 (November 2003).

Purpose of this rule is to furnish a prophylaxis against abuses in the detention process and, more importantly, to place the accused in early contact with a judicial officer so that the right to counsel may not only be explained clearly but also be implemented upon the accused's request. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980).

Limited extraterritorial effect of rule. There is limited extraterritorial effect which the procedural rules of this jurisdiction can generally be given, absent denial of constitutional rights. *People v. Robinson*, 192 Colo. 48, 556 P.2d 466 (1976).

Statements were improperly suppressed when there wasn't an arrest. Defendant was held for the purpose of taking blood samples only. A reasonable person would understand he or she was being detained for that limited purpose and not being arrested. *People v. Turtura*, 921 P.2d 40 (Colo. 1996).

Psychiatric examination of unconsenting party unauthorized. There is no authority in the Rules of Criminal Procedure nor in the statutes for ordering an unconsenting third party to submit to a psychiatric examination. *People v. La Plant*, 670 P.2d 802 (Colo. App. 1983).

Applied in *People v. York*, 189 Colo. 16, 537 P.2d 294 (1975); *People v. Salazar*, 189 Colo. 429, 541 P.2d 676 (1975); *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978); *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980); *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *People v. Boyette*, 635 P.2d 552 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

II. PROCEDURE FOLLOWING ARREST.

Purpose of subsection (a)(1) is to insure that the defendant is adequately informed of his

rights. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

One of the central purposes of restricting unnecessary delay in bringing an arrested person before a judge is to insure that he will be fully informed of the offense involved and of his constitutional rights. *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972). See *People v. Reed*, 180 Colo. 16, 502 P.2d 952 (1972).

This rule was not designed to prevent incriminating statements willingly made during an unnecessary delay where there were no abuses in the detention process. *People v. Roybal*, 55 P.3d 144 (Colo. App. 2001).

Person arrested must be taken before a county judge within a reasonable time and without unnecessary delay. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966); *England v. People*, 175 Colo. 236, 486 P.2d 1055 (1971).

"Necessary delay". A "necessary delay" is one reasonably related to the administrative process attendant upon the arrest of the accused, viz., delays associated with fingerprinting, photographing, taking inventory of personal belongings, preparation of necessary charging documents and reports, and other legitimate administrative procedures. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980); *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Inadvertent delay unnecessary. Where prolonged inadvertence is the only basis for the delay, that delay is unnecessary. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980).

But where arresting authorities delay the accused's judicial advisement on charges from a foreign jurisdiction until after the local charges are completely resolved, delay is unnecessary. *People v. Garcia*, 746 P.2d 560 (Colo. 1987).

Failure to comply with this rule does not automatically invalidate a confession. *Aragon v. People*, 166 Colo. 172, 442 P.2d 397 (1968); *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972); *People v. Reed*, 180 Colo. 16, 502 P.2d 952 (1972); *People v. Litsey*, 192 Colo. 19, 555 P.2d 974 (1976).

Nor require granting motion to dismiss. A violation of Crim. P. 5(a) and 5(c) does not of itself automatically operate to require the granting of a motion to dismiss charges. *People v. Wiedemer*, 180 Colo. 265, 504 P.2d 667 (1972).

As each case must be considered on its own facts where a defendant argues that he was not taken before a county judge within the time required by this rule. *Aragon v. People*, 166 Colo. 172, 442 P.2d 397 (1968); *Jagers v. People*, 174 Colo. 430, 484 P.2d 796 (1971); *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972).

Admissibility of confession dependent on compliance with Miranda. If a statement is admissible as being in compliance with "Miranda", it should not be invalidated because of noncompliance with this rule if there was no studied attempt to avoid taking the defendant before a county judge. *Jaggers v. People*, 174 Colo. 430, 484 P.2d 796 (1971); *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972).

Where defendant was in custody for at least 18 hours before subsection (a)(1) was complied with, and where during this period he was interrogated on two occasions and made incriminating statements during the interrogations, the 18-hour delay neither unfairly prejudiced the defendant nor denied him any basic constitutional right, since prior to both interrogations the defendant was properly advised as required by the *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) decision, and only thereafter did the defendant choose to give the incriminating statements. *People v. Hosier*, 186 Colo. 116, 525 P.2d 1161 (1974).

Failure to comply with this rule did not result in prejudice to the defendant, where the defendant was properly advised as required by *Miranda*, and thereafter chose to make incriminating statements rather than to remain silent. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Where the statement was voluntarily made and the defendant was several times fully advised of his *Miranda* rights, any violation of this rule constituted harmless error and the trial court correctly refused to suppress the defendant's statement on this ground. *People v. Litsey*, 192 Colo. 19, 555 P.2d 974 (1976).

And inability of defendant to show prejudice. In the absence of a factual showing of prejudice, the failure to comply with this rule does not require suppression of voluntary statements. *People v. Litsey*, 192 Colo. 19, 555 P.2d 974 (1976); *People v. Robinson*, 192 Colo. 48, 556 P.2d 466 (1976).

Defendant must prove both unnecessary delay and prejudice to establish a right to relief for a violation of this rule. *People v. Johnson*, 653 P.2d 737 (Colo. 1982).

Violation of subsection (a)(1) does not per se require suppression; rather, the defendant must show prejudice as a result of the delay. *People v. La Plant*, 670 P.2d 802 (Colo. App. 1983).

Showing of prejudice required on motion to dismiss. And before one may prevail on a motion to dismiss charges, he must show that he would be unfairly prejudiced or would be denied some basic rights at trial because of the Crim. P. 5(a)(1) and 5(c) violation. *People v. Wiedemer*, 180 Colo. 265, 504 P.2d 667 (1972).

In the absence of a factual showing of prejudice, the failure to comply with subsection (a)(1) does not require dismissal of a criminal

charge. *People v. Edwards*, 183 Colo. 210, 515 P.2d 1243 (1973).

Before a violation of subsection (a)(1) may be grounds for reversal, it must be shown that the defendant was unfairly prejudiced or denied some basic constitutional rights by reason of the failure to comply with the rule. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973); *People v. Hosier*, 186 Colo. 116, 525 P.2d 1161 (1974).

Test for prejudice. In determining the existence of prejudice the proper inquiry is whether the unnecessary delay reasonably contributed to the acquisition of the challenged evidence. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980); *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980).

To establish prejudice, a defendant must show a nexus between the unnecessary delay and the challenged evidence. In other words, a defendant must establish that the delay induced, caused, or was used to extract a confession. *People v. Roybal*, 55 P.3d 144 (Colo. App. 2001).

In view of the important role played by this rule in speedily implementing the right to counsel especially for an indigent defendant, some important considerations on the issue of prejudice are: whether an attorney had already been retained by, or had been made available to, the defendant during the period of unnecessary delay; whether that attorney was accessible to the defendant prior to the challenged statement; and whether the defendant freely and knowingly waived the presence of the attorney in making the challenged statement to the police. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980).

In determining the existence of prejudice, the appropriate inquiry is whether unnecessary delay reasonably contributed to the acquisition of any challenged evidence. The relevant time period which must be examined is the time between the arrest and the acquisition of the challenged evidence. *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Sufficiency of evidence showing prejudice and nature of prejudice suffered by defendant should be considered by trial court in fashioning sanction, if any, to be imposed for violation and such drastic sanction as dismissal should be imposed only when violation has rendered accused unable to fairly defend against the charges. *People v. Garcia*, 746 P.2d 560 (Colo. 1987).

Prosecution for a misdemeanor charge was properly initiated in accordance with this rule when the defendant posted bail and executed his appearance bond, thereby waiving service of the complaint on him until his appearance date. This procedure also complies with § 16-2-112 and related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time

he is arraigned. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

No prejudice held shown by delay in presenting defendant before judge. *Gottfried v. People*, 158 Colo. 510, 408 P.2d 431 (1965); *Hubbard v. Patterson*, 374 F.2d 856 (10th Cir.), cert. denied, 389 U.S. 868, 88 S. Ct. 142, 19 L. Ed. 2d 144 (1967).

Delay to conduct custodial interrogation is not "necessary". Where delay is occasioned by the decision of law enforcement officers to conduct a custodial interrogation of the defendant before presenting him to a judicial officer for a proper advisement of rights, then clearly such a delay is not "necessary". *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Presumption of regularity of proceedings. Where it is alleged prejudice resulted from non-compliance with this rule, every presumption is indulged in favor of regularity of the proceedings in the trial court, and the burden of showing error is on the party asserting it. *Gottfried v. People*, 158 Colo. 510, 408 P.2d 431 (1965).

But interview of defendant in sheriff's office over 24 hours after arrest does not fulfill requirements of this rule. *People v. Kelley*, 172 Colo. 39, 470 P.2d 32 (1970).

Confession during six-day delay inadmissible. Where there was a delay of six days between the time a defendant was first questioned and the time he was finally brought before a judge and advised of his rights, any statements made prior to compliance with this rule were inadmissible. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

Where delay not unreasonable. Where the defendant was taken before a judge on the afternoon following the evening of his arrest, this is not an unreasonable delay. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Where most of delay in taking defendant before a judge was necessitated by treatment of defendant's wounds, such a delay was not unreasonable, particularly since the delay did not appear to result in coercion or in contributing to defendant's desire to talk. *People v. Valencia*, 181 Colo. 36, 506 P.2d 743 (1973).

Noncompliance with rule may be waived by defendant. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

Justifiable excuse needed to bring defendant before out-of-county judge. A justifiable excuse must be shown to warrant the removal of defendant to a county seat, other than the one in which the alleged offense was committed, where a county judge is available in that county.

Aragon v. People, 166 Colo. 172, 442 P.2d 397 (1968).

Prosecution's remedies when case dismissed. The prosecution has one of two remedies available to it when a case is dismissed in the county court. If the case is dismissed before a preliminary hearing is held, the prosecution may appeal the order of dismissal to the district court. If the county court dismisses a charge after holding a preliminary hearing under subsection (a)(4), the exclusive remedy available to the prosecution is to request leave to file a direct information in the district court. *People v. Freiman*, 657 P.2d 452 (Colo. 1983).

Colorado rule not applicable to defendant arrested in another state by federal agents, and federal rules of criminal procedure control. *People v. Porter*, 742 P.2d 922 (Colo. 1987).

Posting of officers outside defendant's hospital door for the purpose of effecting an arrest upon his release from medical care not an arrest requiring compliance with this rule. *People v. MacCallum*, 925 P.2d 758 (Colo. 1996).

III. APPEARANCE BEFORE COURT.

Judges' duties upon first appearance. Subsection (a)(2) of this rule imposes on the judge at the accused's first appearance the duty to inform him of, and to make certain that he understands, those basic rights applicable upon the initiation of formal criminal proceedings, especially his privilege against self-incrimination and his right to the appointment of an attorney at state expense if he is financially unable to retain one. *People v. Heintze*, 200 Colo. 248, 614 P.2d 367 (1980); *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966); *England v. People*, 175 Colo. 236, 486 P.2d 1055 (1971).

Right to counsel need not be advised where defendant already represented. When accepting a plea of guilty, the trial court is not necessarily required to advise a defendant of his right to counsel when the defendant is represented by counsel at the providency hearing. *People v. Derrerra*, 667 P.2d 1363 (Colo. 1983).

Court may properly allow testimony concerning defendant's pre-advisement silence concerning failure to contact authorities to correct discrepancies in documents if defendant testified and the evidence of defendant's pre-advisement silence was elicited in the cross-examination of defendant for credibility purposes. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

IV. PRELIMINARY HEARING.

Primary purpose of preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the ac-

cused committed a specific crime. *People v. Weaver*, 182 Colo. 221, 511 P.2d 908 (1973); *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973); *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

The rules of criminal procedure relating to a preliminary hearing are intended to create a preliminary screening device by affording a defendant an opportunity, at an early stage of the criminal proceedings, to challenge the sufficiency of the prosecution's evidence before an impartial judge. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974); *People v. District Court*, 652 P.2d 582 (Colo. 1982).

A preliminary hearing provides the accused with an opportunity to challenge the sufficiency of the people's evidence at an early stage in the proceedings. The preliminary hearing is designed to weed out groundless or unsupported charges and to relieve the accused of the degradation and expense of a criminal trial. *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983).

Level of proof required. It is not necessary to introduce evidence sufficient to prove defendant's guilt beyond a reasonable doubt but evidence sufficient to permit a person of ordinary prudence to reasonably believe in defendant's guilt. *People v. Walker*, 675 P.2d 304 (Colo. 1984).

Preliminary hearing presents forum for the presentation and assessment of evidence of probable cause and if prosecuting attorney fails to establish probable cause at a preliminary hearing, the county court is empowered to dismiss the complaint. *Gallagher v. County Court*, 759 P.2d 859 (Colo. App. 1988).

There is no procedure for dismissing a felony complaint without prejudice. Once the filing of a felony complaint in county court is dismissed, the prosecution must either obtain a grand jury indictment or file an information directly in the district court. *People v. Williams*, 987 P.2d 232 (Colo. 1999).

"The offense charged," within subsection (a)(4)(IV), encompasses any lesser included offense of the offense charged. *Hunter v. District Court*, 184 Colo. 238, 519 P.2d 941 (1974).

Defendant's request for preliminary hearing after indictment has been returned is not authorized where such a request, or motion, cannot provide a foundation for the trial court's order for delivery of a requested transcript of the colloquy between the grand jury and the district attorney. *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980).

Demand for hearing to be by written motion. The statutory right to receive a preliminary hearing is not absolute and requires that either the defendant or his attorney, or the prosecuting attorney, file a written motion demanding the preliminary hearing. *People v. Moody*, 630 P.2d 74 (Colo. 1981).

Although oral request may be treated as written motion. A court may treat a defendant's oral request for a preliminary hearing, as a written motion as required by this rule. *People v. Driscoll*, 200 Colo. 410, 615 P.2d 696 (1980).

When juvenile entitled to preliminary hearing. Juveniles charged in delinquency proceedings with crimes (felonies and class 1 misdemeanors) subject to this rule and Crim. P. 7 are entitled to a preliminary hearing. Juveniles held on lesser charges are not granted a right to a preliminary hearing by statute or by rule. *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982).

Prosecution not to present all evidences and witnesses. A preliminary hearing does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

It is unnecessary at a preliminary hearing for the prosecution to show beyond a reasonable doubt that the defendant committed the crime, or even the probability of the defendant's conviction. Instead, the trial court is obligated at the preliminary hearing to view the evidence in the light most favorable to the prosecution and the prosecution therefore is accorded latitude at the preliminary hearing to establish probable cause that the defendant committed the crime charged. *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996); *People v. Hall*, 999 P.2d 207 (Colo. 2000).

Preliminary hearing is not intended to be a mandatory procedural step in every criminal prosecution. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

And does not alter proposition that accused entitled to trial on merits. Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Defendant to appear at requested preliminary hearing. When a defendant requests a preliminary hearing, he has not only the constitutional right to be present, but is under an affirmative obligation and duty to appear at the hearing. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Unless court permits defendant to waive his presence. The court may, when a timely request is made, permit the defendant to waive his presence at the preliminary hearing if the ends of justice would not be frustrated, but the tactical ploy of refusing to produce a defendant at the preliminary hearing to frustrate the prosecution's case should not be tolerated. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Refusal to appear may constitute implied waiver of hearing. Where the judge of the county court advised counsel that the failure of the defendant to appear would constitute a waiver, the defendant's subsequent refusal to appear constituted an implied waiver and extinguished the defendant's right to a preliminary hearing in the county court. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Right to counsel at preliminary hearing reaches constitutional proportions. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

Where the case against the defendant is overwhelming, the absence of counsel at the preliminary hearing is harmless error. *People v. Gallegos*, 680 P.2d 1294 (Colo. App. 1983).

Authority to bind over on lesser included offense. The trial court which holds the preliminary hearing has the authority to bind over the defendant on a lesser included offense. *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

Hearing may be set beyond 30-day period. The absence of open court dates within 30-day period prescribed by this rule constitute good cause for setting a preliminary hearing for a date outside that period. *People v. Hogland*, 37 Colo. App. 34, 543 P.2d 1298 (1975).

Evidence need not be admissible at trial. Hearsay evidence, and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Preliminary hearing in district court after such hearing in county court. After the filing of a direct information in the district court, either the people or the defendant may demand a preliminary hearing in that court even where there has been a dismissal of a felony complaint by the county court following a preliminary hearing on the same charge. *People v. Burggraf*, 36 Colo. App. 137, 536 P.2d 48 (1975).

The purpose of a Crim. P. 5 proceeding is to furnish a prophylaxis against abuses in the detention process and, more importantly, to place the accused in early contact with a judicial officer so that the right to counsel may not only be clearly explained but also be implemented upon the accused's request. *People v. Heintze*, 614 P.2d 367 (Colo. 1980); *People v. Vigoa*, 841 P.2d 311 (Colo. 1992).

Defendant waived showing of good cause necessary to continue preliminary hearing by failing to object to setting of preliminary hearing beyond statutory time requirement. *People v. Thompson*, 736 P.2d 423 (Colo. App. 1987).

Court has jurisdiction to dismiss charges pursuant to this rule after denying continuance where prosecution failed to demonstrate adequate, timely efforts to secure witness' atten-

dance and such dismissal was not an abuse of discretion. *Gallagher v. County Court*, 759 P.2d 859 (Colo. App. 1988).

District court may not review county court's probable cause finding. It is not proper for the district court to review the county court's finding of probable cause. *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Atkin*, 680 P.2d 1277 (Colo. App. 1984); *White v. MacFarlane*, 713 P.2d 366 (Colo. 1986); *Blevins v. Tihonovich*, 728 P.2d 732 (Colo. 1986).

Direct information not available after discharge for failure to gain hearing within 30 days. Crim. P. 7(c), does not allow the filing of a direct information in the district court if the charges, first filed in county court, are dismissed before a preliminary hearing for failure of the prosecution to comply with the 30-day rule in this rule. *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982).

Factors considered when direct filing of information requested. While under Crim. P. 7(c)(2) the district attorney, with the consent of the court, may file a direct information in the district court if a preliminary hearing was held on the same charge in the county court and the accused was discharged, before the district court may properly exercise its discretion, there must be a sufficient evidentiary disclosure by the prosecution to apprise the district court of the earlier dismissal of the identical charges in the county court and the reasons for the requested refiling. When exercising its discretion in deciding whether to permit the direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression. *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983).

No probable cause necessary to bind over habitual criminal charges. Inasmuch as habitual criminal counts do not constitute "offenses", probable cause need not be established in the preliminary hearing to bind these charges over to the district court. *Maestas v. District Court*, 189 Colo. 443, 541 P.2d 889 (1975).

Where technical difficulties prevented defendant from obtaining a transcript of the preliminary hearing, the judge abused his discretion in denying defendant's motion for a second preliminary hearing. Such motion should have been granted because the testimony presented at the first preliminary hearing was directly relevant and significant to defendant's trial preparation, the prosecution was expected to rely on testimony presented at the preliminary hearing, and there was no alternative method of reconstructing the testimony from the preliminary hearing. *Harris v. District Court*, 843 P.2d 1316 (Colo. 1993).

Prosecution may seek a grand jury indictment after dismissal by a county court on a preliminary hearing for lack of probable cause as an alternative to appealing to or filing a direct information in the district court. *People v. Noline*, 917 P.2d 1256 (Colo. 1996).

Because district court applied a flawed interpretation of the law during the preliminary hearing, assessment of probable cause was in error and review requires the court to determine whether the facts, when viewed in the light most favorable to the prosecution, would induce a reasonably prudent and cautious person to entertain the belief that the defendant committed the crime charged. *People v. Hall*, 999 P.2d 207 (Colo. 2000).

When court applies an erroneous legal standard or bases its ruling on erroneous conclusions of law at preliminary hearing, the proper standard of review is de novo, not abuse of discretion. Reviewing court must review the evidence in the light most favorable to prosecution to determine if a reasonably prudent and cautious person could entertain the belief that defendant committed the crime charged. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

Where district court finds that defendant's waiver of right to preliminary hearing is ineffective, the district court has the authority to restore defendant's right to a preliminary hearing. *People v. Nicholson*, 219 P.3d 1064 (Colo. 2009).

V. FAILURE TO FILE FOR PRELIMINARY HEARING.

Waiver occurs when defendant fails to request preliminary hearing. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d

778 (1974); *People ex rel. Farina v. District Court*, 185 Colo. 188, 522 P.2d 589 (1974); *People v. Moody*, 630 P.2d 74 (Colo. 1981).

And affirmative waiver not necessary. Subsection (a)(4)(I), when construed with subsection (a)(5), establishes that an affirmative waiver is not necessary to cause a defendant to lose his right to demand a preliminary hearing. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Effect of waiver. If the defendant waives a preliminary hearing in the county court, he must be bound over for trial, and not for a subsequent preliminary hearing in the district court. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974); *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

An express written waiver by a defendant of his right to a preliminary hearing operates identically to a failure to file within the time limit prescribed by this rule; both requiring the defendant's case to be bound over for trial. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Right not restorable by district court after waiver in county court. A defendant is not entitled to a preliminary hearing in the district court if he has previously waived a preliminary hearing in the county court. *People ex rel. Farina v. District Court*, 185 Colo. 18, 521 P.2d 780 (1974); *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

III. INDICTMENT AND INFORMATION

Rule 6. Grand Jury Rules

(a) The chief judge of the district court in each county or a judge designated by him may order a grand jury summoned where authorized by law or required by the public interest.

(b) The grand jury shall hear witnesses as may be determined by the grand jury and may find an indictment on the sworn testimony of one witness only, except in cases of perjury, when at least two witnesses to the same fact shall be necessary. An indictment may also be found upon the information of two of their own body.

(c) The foreman of the grand jury may swear or affirm all witnesses who may come before the grand jury.

ANNOTATION

Law reviews. For article, "State Grand Jurors in Colorado: Understanding the Process and Attacking Indictments", see 34 Colo. Law. 63 (April 2005).

Grand jury proceedings have been traditionally free of technical rules. *People ex rel. Dunbar v. District Court*, 179 Colo. 321, 500 P.2d 819 (1972).

Applied in *Thomas v. County Court*, 198 Colo. 87, 596 P.2d 768 (1979); *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980).

Rule 6.1. Subpoenas — Issuance and Time Limits

Subpoenas and subpoenas duces tecum shall be issued in accordance with the rules of criminal procedure and these rules and shall be served at least forty-eight hours before any appearance is required before the grand jury, unless waived by the witness. The court, for good cause, may shorten the time limit imposed by this rule.

ANNOTATION

Grand jury dependent on courts for subpoenas. One significant limitation upon the grand jury is that it must rely upon the courts to compel the production of documents or the attendance of witnesses, and, on motion of the witness subpoenaed, the court is given discretion to quash, modify, or order compliance with the subpoena. *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978).

For in camera examination of subpoenaed bank records, see *Pignatiello v. District Court*, 659 P.2d 683 (Colo. 1983).

Applied in *People ex rel. Gallagher v. District Court*, 198 Colo. 468, 601 P.2d 1380 (1979).

Rule 6.2. Secrecy of Proceedings — Witness Privacy — Representation by Counsel

(a) All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. Nothing in this rule shall prevent a disclosure of the general purpose of the grand jury's investigation by the prosecutor.

(b) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of said grand jury. If the witness desires legal assistance during his testimony, counsel must be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an *in camera* hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.

Source: (a) amended, effective November 8, 1990.

ANNOTATION

Law reviews. For comment, "Reporter's Privilege: *Pankratz v. District Court*", see 58 Den. L.J. 681 (1981).

Grand jury secrecy remains important to safeguard a number of different interests to preserve its proper functioning. *Hoffman-*

Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Justifications for grand jury secrecy are several: (1) To prevent the escape of those whose indictment may be contemplated; (2) to prevent disclosure of derogatory information

presented to the grand jury against someone who has not been indicted; (3) to encourage witnesses to come before the grand jury and speak freely with respect to a commission of crimes; (4) to encourage grand jurors in uninhibited investigation of and deliberation on suspected criminal activity. In re P.R. v. District Court, 637 P.2d 346 (Colo. 1981).

Colorado secrecy rules do not violate the first amendment by prohibiting the disclosure of matters a witness learned from her participation in the grand jury process, at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Disclosure of grand jury materials to federal prosecutors without prior approval, in violation of § 16-5-204, did not violate federal constitutional or statutory rights. United States v. Pignatiello, 628 F. Supp. 68 (D. Colo. 1986).

Disclosure that testimony of other grand jury witnesses contradicted current witness' testimony did not violate grand jury secrecy rule where identities of witnesses were not disclosed. People v. Rickard, 761 P.2d 188 (Colo. 1988).

A line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Disclosure of information the witness already had independently of the grand jury

process does not violate this rule. Drawing the line here protects the witness's first amendment right to speak while preserving the state's interest in grand jury secrecy. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Breach of secrecy by prosecution does not warrant dismissal of indictment absent factual findings that defendant is prejudiced. People v. Rickard, 761 P.2d (Colo. 1988).

Jurors and witnesses should be protected vigorously from outside influences. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

Any effort to tamper is reprehensible. Any effort to tamper with or obstruct the due administration of a grand jury's function is reprehensible. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

The jury tampering statute, section 18-8-609, is implemented by this rule. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. Petit jury's subsequent guilty verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993), aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Applied in People ex rel. Losavio v. J.L., 195 Colo. 494, 580 P.2d 23 (1978); Pankratz v. District Court, 199 Colo. 411, 609 P.2d 1101 (1980).

Rule 6.3. Oath of Witnesses

The following oath shall be administered to each witness testifying before the grand jury:

DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

ANNOTATION

Applied in People ex rel. Losavio v. J.L., 195 Colo. 494, 580 P.2d 23 (1978); In re P.R. v. District Court, 637 P.2d 346 (Colo. 1981).

Rule 6.4. Reporting of Proceedings

A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

Rule 6.5. Investigator

(a) **Appointment.** Upon the written motion of the grand jury, the court shall appoint an investigator or investigators to assist the grand jury in its investigative functions. Said investigator may be an existing investigating law enforcement officer who is presently investigating the subject matter before the grand jury.

(b) **Presence.** Upon written motion of the grand jury, approved by the prosecutor, the court, for good cause, may allow a grand jury investigator to be present during testimony to advise the prosecutor. No grand jury investigator shall question any witness before the grand jury. A grand jury investigator shall not comment to the grand jury by word or gesture on the evidence or concerning the credibility of any witness but may testify under oath the same as other witnesses.

ANNOTATION

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. Petit jury's subsequent guilty

verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

Rule 6.6. Indictment — Presentation — Sealing

(a) Presentation of an indictment in open court by a grand jury may be accomplished by the foreman of the grand jury, the full grand jury, or by the prosecutor acting under instructions of the grand jury.

(b) Upon motion by the prosecutor, the court shall order the indictment to be sealed and no person may disclose the existence of the indictment until the defendant is in custody or has been admitted to bail, except when necessary for the issuance of a warrant or summons.

Source: Entire rule amended and adopted December 19, 1996, effective March 1, 1997.

ANNOTATION

It was not essential for all members of a grand jury who issued a true bill to specifically observe the formal charging paper and

approve its formal language. *People v. Campbell*, 194 Colo. 451, 573 P.2d 557 (1978).

Rule 6.7. Reports

A grand jury report may be prepared and released as permitted by § 16-5-205.5, C.R.S.

Source: Entire rule amended and adopted September 10, 1998, effective January 1, 1999.

ANNOTATION

Section 16-5-205, relating to informations and indictments, applies to the extent of any conflict with this rule. *de'Sha v. Reed*, 194 Colo. 367, 572 P.2d 821 (1977).

Applied in *In re 1976 Arapahoe County Statutory Grand Jury*, 194 Colo. 308, 572 P.2d 147 (1977); *Charnes v. Lilly*, 197 Colo. 460, 593 P.2d 967 (1979).

Rule 6.8. Indictment — Amendment

(a) **Matters of Form, Time, Place, Names.** At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity for the defendant to be heard, order the amendment of an indictment with respect to defects,

errors, or variances from the proof relating to matters of form, time, place, and names of persons when such amendment does not change the substance of the charge, and does not prejudice the defendant on the merits. Upon ordering an amendment, the court, for good cause, may grant a continuance to accord the defendant adequate opportunity to prepare his defense.

(b) **Prohibition as to Substance.** No indictment may be amended as to the substance of the offense charged.

ANNOTATION

The policy underlying this rule is to insure that an indictment reflects the will of the grand jury. *People v. Campbell*, 194 Colo. 451, 573 P.2d 557 (1978).

It was not essential for all members of a grand jury who issued a true bill to specifically observe the formal charging paper and approve its formal language. *People v. Campbell*, 194 Colo. 451, 573 P.2d 557 (1978).

Trial court did not violate this rule by allowing the indictment to be amended to add a charge where the defendant entered into an agreement to plead *nolo contendere* to the added charge in exchange for a dismissal of all other charges in the indictment. *People v. Valdez*, 928 P.2d 1387 (Colo. App. 1996).

Trial court's addition of habitual criminal counts had no effect on the substance of the indictment or the second degree assault charge and did not violate the provision of this rule prohibiting such amendments under this rule. *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000).

An indictment may be amended to fix defects, errors, or variances of proof, if the change is not substantial or an element of the crime. The indictment was amended to change dates and the dates were not a material element of any of the offenses, therefore, the defendant was not prejudiced. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

Applied in *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

Rule 6.9. Testimony

(a) **Release to Prosecutor.** Upon application by the prosecutor, the court, for good cause, may enter an order to furnish to the prosecutor transcripts of grand jury testimony, minutes, reports, or exhibits relating to them.

(b) **Release to Witness.** Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(c) **Limitations on Release.** An order to furnish transcripts of grand jury testimony, minutes, reports, or exhibits under this rule shall specify the person or persons who may be granted access to such material upon its release. Such order shall also specify any limitations which the court finds should be imposed on the use to be made of such material by any person or persons, after giving due consideration to the provisions of Rule 6.3. Such order shall also provide that release of such material shall not be made by the clerk of the court until the filing of an oath of affirmation of acceptance by the person receiving such material of the restrictions and limitations which are specified by the court under this paragraph.

(d) **Indicted Defendant's Discovery Rights.** Nothing herein shall limit the right of an indicted defendant to discovery under the rules of criminal procedure.

ANNOTATION

Applied in *Charnes v. Lilly*, 197 Colo. 460, 593 P.2d 967 (1979).

Rule 7. The Indictment and the Information

(a) The Indictment.

(1) An indictment shall be a written statement presented in open court by a grand jury to the district court which charges the commission of any crime by an alleged offender.

(2) **Requisites of the Indictment.** Every indictment of the grand jury shall state the crime charged and essential facts which constitute the offense. It also should state:

(I) That it is presented by a grand jury;

(II) That the defendant is identified therein, either by name or by the defendant's patterned chemical structure of genetic information, or described as a person whose name is unknown to the grand jury;

(III) That the offense was committed within the jurisdiction of the court, or is triable therein;

(IV) That it is signed by the foreman of the grand jury, and the prosecutor.

(b) The Information.

(1) An information shall be a written statement, signed by the prosecutor and filed in the court having jurisdiction over the offense charged, alleging that a person committed the criminal offense described therein.

(2) **Requisites of the Information.** The information shall be deemed technically sufficient and correct if it can be understood therefrom:

(I) That it is presented by the person authorized by law to prosecute the offense;

(II) That the defendant is identified therein, either by name or by the defendant's patterned chemical structure of genetic information, or described as a person whose name is unknown to the informant;

(III) That the offense was committed within the jurisdiction of the court, or is triable therein;

(IV) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction.

(3) **Information After Preliminary Hearing Waiver or Dispositional Hearing.** An information may be filed, without consent of the trial court having jurisdiction, for any offense against anyone who has either:

(I) Failed to request a preliminary hearing in the county pursuant to Rule 5;

(II) Had a preliminary hearing or dispositional hearing and has been bound over by the county court to appear in the court having trial jurisdiction.

(4) When a defendant has been bound over to the trial court pursuant to Rule 5 (a)(4)(III), the felony complaint when transferred to the trial court shall be deemed to be an information if it contains the requirements of an information.

(c) **Direct Information.** The prosecutor may file a direct information if:

(1) The prosecutor obtains the consent of the court having trial jurisdiction and no complaint was filed against the accused person in the county court pursuant to Rule 5; or

(2) A preliminary hearing was held either in the county court or in the district court and the court found probable cause did not exist as to one or more counts. If the prosecutor states an intention to proceed in this manner, the bond executed by the defendant shall be continued and returnable in the district court at a day and time certain. If a bond has not been continued, the defendant shall be summoned into court without the necessity of making a new bond. The information shall be accompanied by a written statement from the prosecutor alleging facts which establish that evidence exists which for good cause was not presented by the prosecutor at the preliminary hearing. Within 21 days of defendant's first appearance following the direct filing the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause; or

(3) The prosecutor obtains the consent of the court having trial jurisdiction and the complaint upon which the preliminary hearing was held and the other records in the case have not been delivered to the clerk of the proper trial court.

(4) The case was dismissed before a preliminary hearing was held in the county court or in the district court, when one is required, or, in other cases, before the defendant was bound over to the trial court or otherwise set for arraignment or trial. The information shall be accompanied by a written statement from the prosecutor stating good cause for dismissing and then refile the case. Within 21 days after defendant's first appearance following the direct filing the defendant may request a hearing at which the prosecutor shall establish the existence of such good cause. The prosecution may also submit the matter to a grand jury.

(5) The case was dismissed after the district or county court found probable cause at the preliminary hearing if one was required or, in other cases, after the defendant was bound over to the trial court or otherwise set for arraignment or trial, and before jeopardy has attached. If such case was originally filed by direct information in the district court, the prosecution may not file the same offense(s) by a felony complaint in the county court, but the prosecution may charge the same offense(s) by filing a direct information in the district court or may submit the matter to a grand jury, and the case shall then proceed as if the previous case had never been filed. The prosecution shall also file with the direct information or with the felony complaint a statement showing good cause for dismissing and then refiling the case. Within 21 days of defendant's first appearance following the filing of the new felony complaint or the direct filing of the new information the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(d) Repealed.

(e) **Amendment of Information.** The court may permit an information to be amended as to form or substance at any time prior to trial; the court may permit it to be amended as to form at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) **Surplusage.** The court, on motion of the defendant or the prosecutor, may strike surplusage from the information or indictment.

(g) **Bill of Particulars.** The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within 14 days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(h) **Preliminary Hearing - District Court Procedures.**

(1) In cases in which a direct information was filed pursuant to Rule 7(c), either the defendant, or the prosecutor, if accused of a class 1, 2, or 3 felony or a class 4, 5, or 6 felony if such felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S. may request a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony who may not request a preliminary hearing shall participate in a dispositional hearing unless otherwise waived for the purposes of case evaluation and potential resolution. The request for a preliminary hearing shall be made prior to plea together with any motions filed pursuant to Rule 12(b). The trial court may permit a request for a preliminary hearing to be made after a plea only upon a showing of good and sufficient cause. No request for a preliminary hearing may be filed in a case which is to be tried upon indictment.

(2) Upon the making of such a request, or if a dispositional hearing is required, the district court shall set the hearing which shall be held within 35 days of the day of the setting, unless good cause for continuing the hearing beyond that period is shown to the court. The clerk of the court shall prepare and give notice of the hearing, or any continuance thereof, to all parties and their counsel.

(3) The defendant shall not be called upon to plead at the preliminary hearing. The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The presiding judge at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(4) If, from the evidence, it appears to the district court that no probable cause exists to believe that any or all of the offenses charged were committed by the defendant, the court shall dismiss those counts from the information and, if the court dismisses all counts, discharge the defendant; otherwise, or subsequent to a dispositional hearing, it shall set the

case for arraignment or trial. If the prosecutor believes the court erred in its finding of no probable cause, this ruling may be appealed pursuant to Colorado Appellate Rules. Such a ruling shall not constitute good cause for refileing.

(4.5) A dispositional hearing is an opportunity for the parties to report to the court on the status of discussions toward disposition, including presenting any resolution pursuant to C.R.S. 16-7-302. The court shall set the dispositional hearing at a time that will afford the parties an opportunity for case evaluation and potential resolution.

(5) If a request for preliminary hearing has not been filed within the time limitations of subsection (h)(1) of this Rule, such a request shall not thereafter be heard by the court, nor shall the court entertain successive requests for preliminary hearing. The order denying a dismissal of any or all of the counts in the information after a preliminary hearing shall be final and not subject to review on appeal. The granting of such a dismissal or any or all of the counts in an information shall not be a bar to further prosecution of the accused person for the same offenses. Upon a finding of no probable cause, the prosecution may appeal pursuant to Rule 7(h)(4), may file another direct information in the district court pursuant to Rule 7(c)(2) charging the same offense(s) or may submit the matter to a grand jury, but in such cases originally filed by direct information in the district court, the prosecution may not refile the same offense(s) by a felony complaint in the county court.

Source: Entire rule amended March 31, 1988, effective January 1, 1989; (d) repealed September 4, 1997, effective January 1, 1998; (b)(3), (h)(1), (h)(2), and (h)(4) amended and (h)(4.5) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted September 12, 2000, effective January 1, 2001; (c) and (h) amended and effective January 17, 2008; (c)(2), (c)(4), (c)(5), (g), and (h)(2) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Indictment.
- III. Information.
 - A. In General.
 - B. Affidavits.
- IV. Direct Information.
 - V. Names of Witnesses.
- VI. Nature and Contents of Information.
- VII. Amendment of Information.
- VIII. Surplusage.
- IX. Bill of Particulars.
- X. Preliminary Hearing.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Preliminary Hearings — The Case for Revival", see U. Colo. L. Rev. 580 (1967).

Means by which charges brought by district attorney. A district attorney may bring charges either by filing a complaint or direct information or by presenting a grand jury indictment in open court. *Dresner v. County Court*, 189 Colo. 374, 540 P.2d 1085 (1975).

Applied in *Bustos v. People*, 158 Colo. 451, 408 P.2d 64 (1965); *Lorenz v. People*, 159 Colo. 494, 412 P.2d 895 (1966); *Tyler v. Russel*, 410 F.2d 490 (10th Cir. 1969); *Rowse v. District Court*, 180 Colo. 44, 502 P.2d 422 (1972); *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Shorti*, 192 Colo. 183, 557 P.2d 388 (1976); *People v. Denn*, 192 Colo.

276, 557 P.2d 1200 (1976); *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978); *People v. Rice*, 40 Colo. App. 374, 579 P.2d 647 (1978); *People v. Kreiser*, 41 Colo. App. 210, 585 P.2d 301 (1978); *People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979); *People v. Driscoll*, 200 Colo. 410, 615 P.2d 696 (Colo. 1980); *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Anderson*, 659 P.2d 1385 (Colo. 1983); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

II. INDICTMENT.

It is defendant's right to be informed with reasonable certainty of nature of charges against him by requiring that an indictment answer the questions of "who, what, where, and how" in cases where the acts constituting the offense are not adequately described by the statute. *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978); *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Indictment must clearly state essential facts which constitute the offense: Fundamental fairness requires no less. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Test of sufficiency of indictment is whether it is sufficiently definite to inform the defendant of the charges against him so as to enable him to prepare a defense and to plead the judgment in bar of any further prosecutions for the same offense. *People v. Westendorf*, 37 Col. App. 111, 542 P. 2d 1300 (1975); *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

An indictment is sufficient so long as it is not so indefinite in its statement of a particular charge that it fails to afford defendant a fair opportunity to procure witnesses and prepare for trial. *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), *rev'd* on other grounds, 712 P.2d 1023 (Colo. 1986).

When an indictment is procured by or with the assistance of a prosecuting attorney who is disqualified to conduct the prosecution, it is invalid. Once the disqualification of a district attorney is entered and the appointment of a special prosecutor becomes effective, the special prosecutor, and only the special prosecutor, is the authorized prosecuting attorney on the case. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

Orderly sequence of statement of elements of offense should characterize indictment. *Johnson v. People*, 110 Colo. 283, 133 P.2d 789 (1943).

The requirements of a criminal indictment by a grand jury are essentially twofold: First, it must give the defendant sufficient notice of the crime that has allegedly been committed so that a defense may be prepared; second, it must define the acts which constitute the crime with sufficient definiteness so that the defendant may plead the resolution of the indictment as a bar to subsequent proceedings. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Insufficient indictment does not legally charge crime or subject defendant to the jurisdiction of the court. *People v. Westendorf*, 37 Colo. App. 111, 542 P. 2d 1300 (1975).

And jeopardy does not attach to indictment defective in substance. An indictment which is defective in substance merely prevents prosecution on the basis of that particular pleading. No jeopardy attaches, and the defendant may be charged by any appropriate and sufficient pleading. *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

Recitation of statute may be insufficient. Where acts constituting an offense are not described by the statute, any indictment merely reciting the statutory words is insufficient. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Defendant may raise insufficiency for first time on appeal. Although defendant did not raise the insufficiency of the indictment at trial or in his motion for new trial, he is not thereby precluded from asserting that defect on appeal. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

Date of offense is material allegation. Allegations specifying the date on which an accused allegedly committed an offense are always material when the offense charged is one which may be barred by an applicable statute of limitations. *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

Because of the veil of secrecy surrounding most conspiracies, considerable latitude is allowed in drafting conspiracy indictment. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

III. INFORMATION.

A. In General.

District attorney has the authority to file a complaint or information in derogation of grand jury's true bill. *Dresner v. County Court*, 189 Colo. 374, 540 P.2d 1085 (1975).

Practice of effecting charge through information is not unconstitutionally void as not affording the protection of a grand jury. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969); *Sargent v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

But if information fails to charge crime, court acquires no jurisdiction. *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980).

If the information is not presented by a person authorized by law to prosecute the offense, it is technically insufficient and incorrect and if it is signed by an unauthorized person, it is invalid. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

When an information is presented by a disqualified prosecuting attorney, it is invalid. Once the disqualification of a district attorney is entered and the appointment of a special prosecutor becomes effective, the special prosecutor, and only the special prosecutor, is the authorized prosecuting attorney on the case. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

Count charged both the crime of sexual assault on a child and the sentence enhancer by clearly identifying each of the elements of both with sufficient particularity. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

Amendment of information on date of trial was proper since the amendment went to the dates of the offenses and did not prejudice defendant. The date change was not substantive and there was no prejudice to defendant because previous informations had included the dates in the amendment, so defendant was on notice the charges could include those dates. *People v. Walker*, __ P.3d __ (Colo. App. 2011).

Failure to include intent to seek discretionary indeterminate sentencing in information is not plain error. Defendant was aware he was

charged with a crime in which indeterminate sentencing was a possibility. *People v. Walker*, __ P.3d __ (Colo. App. 2011).

B. Affidavits.

Law reviews. For article, "Confidential Informants To Disclose or Not to Disclose", see 19 Colo. Law. 225 (1990).

Verification of an information is required under this rule. *Scott v. People*, 176 Colo. 289, 490 P.2d 1295 (1971).

Technical defects in the form of an information do not require reversal unless substantial rights of the defendant are prejudiced. Information which omitted the words "against the peace and dignity of the {People of the State of Colorado}", did not prejudice defendant's substantial rights. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Affiant's competency presumed. It is unnecessary for the affidavit to recite that affiant is "a competent witness to testify in the case", as his competency will be presumed until the contrary appears. *Walt v. People*, 46 Colo. 136, 104 P.2d 89 (1909), appeal dismissed, 223 U.S. 748, 32 S. Ct. 534, 56 L. Ed. 640 (1912); *Hubbard v. People*, 153 Colo. 252, 385 P.2d 419 (1963).

As is credibility. An affiant's credibility as a witness is presumed until the contrary appears. *Hubbard v. People*, 153 Colo. 252, 385 P.2d 419 (1963).

Signing affidavit before reading does not nullify affiant's credibility. Although it is extremely poor practice to sign without reading, such does not make affiant an uncredible, where he signed the affidavit as prepared and explained to him, believing he knew what it said. *Williams v. People*, 157 Colo. 443, 403 P.2d 436 (1965).

Nor does minor factual discrepancy. A discrepancy in the amount of money taken and charged in the affidavit does not render affiant incompetent as a witness. *Williams v. People*, 157 Colo. 443, 403 P.2d 436 (1965).

Affidavit complies with rule despite technical error. Where a defendant is charged with more than one crime, an affidavit which uses the word "offense" rather than "offenses" substantially complies with this rule. *Martinez v. People*, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed. 2d 104 (1965).

And evidence adduced at preliminary hearing may cure defect in affidavit. Where defendants exercised their rights to a preliminary hearing and had the issue of probable cause determined against them by direct evidence, which would be sufficient to satisfy the requirements of this rule, the evidence adduced at the preliminary hearing cured a defect in the affidavit and rendered the issue of personal knowledge of the affiant on the information

moot. *People v. Weaver*, 182 Colo. 221, 511 P.2d 908 (1973).

Affidavit sufficient to meet requirements of this rule. *Williams v. People*, 157 Colo. 443, 403 P.2d 436 (1965); *Coy v. People*, 158 Colo. 437, 407 P.2d 345 (1965); *Andrews v. People*, 161 Colo. 516, 423 P.2d 322 (1967).

Not denial of right of confrontation where affiant does not testify at trial. A defendant is not denied his constitutional right of confrontation because an individual who verified the information and who was indorsed as a witness does not testify at the time of trial. *Scott v. People*, 176 Colo. 289, 490 P.2d 1295 (1971).

IV. DIRECT INFORMATION.

Prosecution's remedies upon dismissal in county court. The prosecution has one of two remedies available to it when a case is dismissed in the county court. If the case is dismissed before a preliminary hearing is held, the prosecution may appeal the order of dismissal to the district court. If the county court dismisses a charge after holding a preliminary hearing under Crim. P. 5(a)(4), the exclusive remedy available to the prosecution is to request leave to file a direct information in the district court. *People v. Freiman*, 657 P.2d 452 (Colo. 1983).

There is no procedure for dismissing a felony complaint without prejudice. Once the filing of a felony complaint in county court is dismissed, the prosecution must either obtain a grand jury indictment or file an information directly in the district court. *People v. Williams*, 987 P.2d 232 (Colo. 1999).

The purpose to be achieved by the district court consent requirement of subsection (c)(2) is to insure that the accused is not subject to oppressive and malicious prosecutions. *People v. Elmore*, 652 P.2d 571 (Colo. 1982).

Consent of court cannot be perfunctory. *People v. Swazo*, 191 Colo. 425, 553 P.2d 782 (1976).

As informed consent required. The logical application of section (c), requires informed consent. Otherwise, any real distinction between subsection (b)(3), and section (c) would be illusory. *People v. Swazo*, 191 Colo. 425, 553 P.2d 782 (1976).

And exercise of discretion. The requirement of court consent implies a real application of discretion. *People v. Swazo*, 191 Colo. 425, 553 P.2d 782 (1976); *People v. Elmore*, 652 P.2d 571 (Colo. 1982); *People v. Sabell*, 708 P.2d 463 (Colo. 1985).

In exercising its discretion in deciding whether to permit a direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused

from discrimination and oppression. *People v. Freiman*, 657 P.2d 452 (Colo. 1983).

There is no constitutional right to a preliminary hearing when a direct information is filed. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969); *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972); *Sergeant v. People*, 177 Colo. 354, 497 P.2d 983 (1972); *People v. Moreno*, 181 Colo. 106, 507 P.2d 857 (1973).

As bringing charge by direct information is not in violation of either state or federal constitution. *Habbord v. People*, 175 Colo. 417, 488 P.2d 554 (1971).

And whether a preliminary hearing shall be had is a procedural matter. *De Baca v. Trujillo*, 167 Colo. 311, 447 P.2d 533 (1968).

Purpose behind requiring personal knowledge of affiant in direct information is to assure that there is probable cause to initiate the criminal proceeding, so as to safeguard the rights of innocent citizens. *People v. Weaver*, 182 Colo. 221, 511 P.2d 908 (1973).

Authority to file direct information charging differently than true bill. Where a true bill was never filed in district court, the district attorney had the power and authority to file a complaint or direct information that included charges which were different than those allegedly set forth in the true bill returned by a grand jury. *Dresner v. County Court*, 189 Colo. 374, 540 P.2d 1085 (1975).

No requirement of new evidence to support direct filing. There is no requirement that the district attorney establish that there exists new or additional evidence to support the direct filing of an information. The existence of such evidence is only one factor the district court may consider in exercising its discretion to determine whether to allow the direct filing. *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983).

Incompetent evidence acceptable at hearing. Hearsay evidence, and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Prosecutor must apprise judge of prior dismissal of charges. For consent to be valid, there must be a sufficient evidentiary disclosure by the prosecutor to at least apprise the judge of a prior dismissal of the identical charges in county court and the reasons for the direct filing. *People v. Swazo*, 191 Colo. 425, 553 P.2d 782 (1976).

And hearing in district court may be demanded even though such hearing was held in county court. After the filing of a direct information in the district court either the people or the defendant may demand a preliminary hearing in that court even where there has been a dismissal of a felony complaining by the county court following a preliminary hearing on the

same charge. *People v. Burggraf*, 36 Colo. App. 137, 536 P.2d 48 (1975).

Direct information not available after dismissal for failure to prosecute. Section (c) does not allow filing of a direct information in the district court if the charges, first filed in county court, are dismissed before a preliminary hearing for failure of the prosecution to comply with the 30-day rule in *Crim. P. 5(a)(4)(I)*. *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982).

Court's discretion in filing direct information following dismissal. While under subsection (c)(2), the district attorney, with the consent of the court, may file a direct information in the district court if a preliminary hearing was held on the same charge in the county court and the accused was discharged, before the district court may properly exercise its discretion, there must be a sufficient evidentiary disclosure by the prosecution to apprise the district court of the earlier dismissal of the identical charges in the county court and the reasons for the requested refiling. When exercising its discretion in deciding whether to permit the direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression. *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Sabell*, 708 P.2d 463 (Colo. 1985).

When the motion under subsection (c)(2) did not identify the county court's error and did not describe testimony at the preliminary hearing in detail, there was not sufficient evidentiary disclosure to allow refiling. *Borg v. District Court*, 686 P.2d 781 (Colo. 1984).

Requirement of district court's consent for filing of direct information implies an exercise of court's discretion which will not be overturned unless there exists abuse of such discretion. *People v. Stokes*, 812 P.2d 712 (Colo. App. 1991).

Trial court's denial of defendant's motion to dismiss, despite failure of prosecution to advise trial court of prior dismissal, was not error where consent by the court was obtained and the dismissed case involved separate and distinct charges. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Belief that county court erred in finding no probable cause existed for sexual assault charge does not constitute good cause for refiling charges by direct information as issue of adequacy of evidence may be addressed only upon appellate review. *People v. Stokes*, 812 P.2d 712 (Colo. App. 1991).

District court's denial of consent for filing of direct information did not constitute abuse of discretion when prosecution did not present testimony of victim in county court proceedings

for tactical reasons. *People v. Stokes*, 812 P.2d 712 (Colo. App. 1991).

District attorney allowed to join offenses arising from criminal episode. This rule allows the district attorney, with the consent of the trial court, to file a direct information joining any or all offenses arising from a criminal episode. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973).

V. NAMES OF WITNESSES.

Compliance with this rule is mandatory for district attorney. *People v. Bailey*, 191 Colo. 366, 552 P.2d 1014 (1976).

Purpose of supplying names of witnesses with the indictment or information is to advise defendants of the identity of those who might testify against them and to afford counsel an opportunity, where deemed advisable, to interview such witnesses. *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970); *People v. Bailey*, 191 Colo. 366, 552 P.2d 1014 (1976).

Allowance of late endorsements of prosecution witnesses is within discretion of trial court. *People v. Muniz*, 622 P.2d 100 (Colo. App. 1980); *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed. 2d 302 (1964); *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972); *People v. Wandel*, 713 P.2d 398 (Colo. App. 1985).

And no error unless defendant prejudiced. In order to constitute reversible error where there is a late endorsement of a witness, the defendant must show that he was prejudiced because the appearance of the witness surprised him and because he did not have adequate opportunity to interview the witness prior to trial. *People v. Bailey*, 191 Colo. 366, 552 P.2d 1014 (1976).

Trial court did not abuse its discretion in allowing prosecution to endorse four witnesses on the day of the trial where defendant was familiar with testimony of three of the witnesses and did not request a continuance for the purpose of interviewing them, and where endorsement of the fourth witness was conditioned upon defendant having access prior to the witness' testimony. *People v. Castango*, 674 P.2d 978 (Colo. App. 1983).

When failure to notify defendant of witness's change of address not reversible error. Failure to notify defendant of a change of address of a witness is not grounds for reversal where no surprise is shown when he testifies at the trial, no continuance has been sought on the grounds that there was no opportunity to interview him prior to trial, and no attempt has been made to ascertain his current address if defendant had sought to locate him for the purpose of interview. *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970).

Defense counsel's refusal to request continuance may be waiver of claim of prejudicial error due to late endorsement. *People v. Bailey*, 191 Colo. 366, 552 P.2d 1014 (1976).

VL. NATURE AND CONTENTS OF INFORMATION.

A specific crime must be alleged in the information. *Gomez v. People*, 162 Colo. 77, 424 P.2d 387 (1967); *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968).

But the name of the crime need not be mentioned in an information, if the crime is adequately described therein. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Rather, information is sufficient if it advises a defendant of the offense with which he is charged. *Edwards v. People*, 176 Colo. 491, 491 P.2d 566 (1971); *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973); *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973); *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973); *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980).

And can be understood by the jury. An information is sufficient if the charge is in language from which the nature of the offense may be readily understood by the accused and jury. *Tracy v. People*, 65 Colo. 226, 176 P. 280 (1918); *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924); *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932); *Johnson v. People*, 110 Colo. 283, 133 P.2d 789 (1943); *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *Olguin v. People*, 179 Colo. 26, 497 P.2d 1254 (1972).

So that defendant can defend against it. An information is sufficient if it advises the accused of the charge he is facing so that he can adequately defend against it. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968); *Perez v. People*, 176 Colo. 505, 491 P.2d 969 (1971); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973); *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973); *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

And be protected from further prosecution for the same offense. An information is sufficient if it advises the defendant of the charges he is facing so that he can adequately defend himself and be protected from further prosecution for the same offense. *People v. Warner*, 112 Colo. 565, 151 P.2d 975 (1944); *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961); *People v. Allen*, 167 Colo. 158, 446 P.2d 223 (1968); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *Olguin v. People*, 179 Colo.

26, 497 P.2d 1254 (1972); *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973); *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973); *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973); *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980); *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

Although great detail not needed as judgment, not information, constitutes bar. An information need not plead an offense in such detail as to be self-sufficient as a bar to further prosecution for the same offense; for the judgment constitutes a bar, and the extent of the judgment may be determined from an examination of the record as a whole. *Mora v. People*, 172 Colo. 261, 472 P.2d 142 (1970); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Jeopardy does not attach if information is insufficient to sustain conviction. *People v. Garner*, 187 Colo. 294, 530 P.2d 496 (1975).

Dismissal if defendant not fairly and reasonably informed of accusations. There must be a variance between the information and the proof to be offered constituting such an imperfection or inaccuracy that the defendant was not fairly and reasonably informed of the nature and cause of the accusations against him in order that a motion of dismissal be granted. *People v. Allen*, 167 Colo. 158, 446 P.2d 223 (1968).

Each count of information must be independent. Absent a clear and specific incorporation by reference, each count of an information to be valid must be independent of the others, and in itself charge the defendant with a distinct and different offense. *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980); *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981).

But clear and specific incorporation by reference permitted. Any count in an information may, by proper reference, incorporate the allegations more fully set forth in another count, such reference must be clear, specific, and leave no doubt as to what provision is intended to be incorporated and this same rule is applicable to incorporating the caption. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981).

Information is sufficient if it charges crime in the words of the statute. *Williams v. People*, 26 Colo. 272, 57 P. 701 (1899); *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971); *Perez v. People*, 176 Colo. 505, 491 P.2d 969 (1971); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *Olguin v. People*, 179 Colo. 26, 497 P.2d 1254 (1972); *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

However, an information need not follow the exact wording of the statute. *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924); *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932);

Helser v. People, 100 Colo. 371, 68 P.2d 543 (1937); *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961); *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964); *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968); *Perez v. People*, 176 Colo. 505, 491 P.2d 969 (1971); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

The charging of a defendant in the conjuncture where a statute defines a crime as being capable of being committed in diverse ways is proper. *Rowe v. People*, 26 Colo. 542, 59 P. 57 (1899); *Hernandez v. People*, 156 Colo. 23, 396 P.2d 952 (1964).

And statutory reference is not material part of information, and, in the absence of any showing that the defendant is actually misled to his prejudice by such an inaccuracy, no error arises therefrom. *Lucero v. People*, 164 Colo. 247, 434 P.2d 128 (1967); *People v. Marion*, 182 Colo. 435, 514 P.2d 327 (1973); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

Information need not specify lesser included offenses which may have been committed in commission of the described act. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

No information is deemed insufficient by any defect which does not tend to prejudice the substantial rights of the defendant on the merits. *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932); *Martinez v. People*, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed. 2d 104 (1965).

Date of offense is not material allegation of information. *Marn v. People*, 175 Colo. 242, 486 P.2d 424 (1971).

Where the defendant made no showing that he was impaired in his defense to the charge at trial or in his ability to plead the judgment as a bar to a subsequent proceeding, a variance between the specific date of the offense as alleged in the information and the date as proved at trial is not fatal. *People v. Adler*, 629 P.2d 569 (Colo. 1981).

The prosecution is not required to specify a precise date of an alleged offense unless that date is a material element of the offense. *People v. Salyer*, 80 P.3d 831 (Colo. App. 2003).

But failure to allege where offense committed makes information insufficient. When an information fails to allege where the offense was committed, and thus, that it occurred within the jurisdiction of the court, it fails to state facts sufficient to confer jurisdiction upon the district court of the county in which it is filed to try the defendant. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981).

Separate allegation of place where offense was committed, which specifically referred to

all previously alleged offenses, clearly advised defendant of claimed location of offenses, and was sufficient. *People v. Brinson*, 739 P.2d 897 (Colo. App. 1987).

If the information is signed by an unauthorized person, it is invalid. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

Information charging offense beyond statute of limitations. The trial court has jurisdiction to entertain a motion to amend an information which charges an offense committed outside of the statute of limitations. *People v. Bowen*, 658 P.2d 269 (Colo. 1983).

When general statement of offense not error. Charging theft of "miscellaneous personal property" in information is sufficient where itemized list is furnished defense. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

And poor writing style not error where nature of charge clear. Where an information could have been written in far better style, but there can be no doubt that its meaning is clear, then defendants are adequately advised of the nature of the crime charged against them, and this is all section (c) requires. *Covington v. People*, 36 Colo. 183, 85 P. 832 (1906); *Petty v. People*, 156 Colo. 549, 400 P.2d 666 (1965).

Sufficiency of information is matter of jurisdiction. *People v. Garner*, 187 Colo. 294, 530 P.2d 946 (1975).

And such matter may be raised after trial by a motion in arrest of judgment. *People v. Garner*, 187 Colo. 294, 530 P.2d 496 (1975).

VII. AMENDMENT OF INFORMATION.

The purposes served by a criminal information are to advise the defendant of the nature of the charges against him, to enable him to prepare a defense, and to protect him from further prosecution for the same offense, and it is within the discretion of the trial court to allow the information to be amended as to form or substance any time prior to trial. *People v. Thomas*, 832 P.2d 990 (Colo. App. 1991).

When the defendant had actual notice before trial that he was being charged with having committed three prior felonies under § 16-13-101 (2) rather than two prior felonies under § 16-13-101 (1), an amendment to the information to reflect that state of affairs was a matter of form and not of substance. *People v. Butler*, 929 P.2d 36 (Colo. App. 1996).

Substance should prevail over form and cases generally should not be dismissed for technical irregularities that can be cured through amendment. *People v. Hertz*, 196 Colo. 259, 586 P.2d 5 (1978); *People v. Cervantes*, 677 P.2d 403 (Colo. App. 1983), *aff'd*, 715 P.2d 783 (Colo. 1986).

An amended complaint that merely remedies an insufficient list of victims in the original complaint relates back to the date of the original

and is not time-barred. *People v. Higgins*, 868 P.2d 371 (Colo. 1994).

Where late amendment of information allowed. Where the court allowed the prosecution to amend the information one week before trial and then denied defendants' motions for continuance, there was no abuse of discretion where defendants' counsel knew of the amendment two weeks before trial, where the trial was reset so as to grant an additional week's continuance, where the amendment added nothing substantial to the original charge, and where there was no showing in the record that defendants were prejudiced by the denial. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

Defendant must request continuance to claim prejudice or surprise. Defendant who did not request continuance when amendments and deletions to information were made has no basis for claiming prejudice or surprise. *People v. Marion*, 182 Colo. 435, 514 P.2d 327 (1973); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People v. Cervantes*, 677 P.2d 403 (Colo. App. 1983), *aff'd*, 715 P.2d 783 (Colo. 1986).

No amendment of substance after prosecution presents evidence. An accused person is entitled to be tried on the specific charge contained in the information, and after a plea of not guilty has been entered and the state has submitted all the evidence which the prosecutor desires to present to sustain that charge, no amendment can be made thereto which changes entirely the substance of the crime which defendant is alleged to have committed. *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964); *People v. Jefferson*, 934 P.2d 870 (Colo. App. 1996).

A constructive amendment after completion of the evidence is per se reversible error. *People v. Madden*, 87 P.3d 153 (Colo. App. 2003), *rev'd* on other grounds, 111 P.3d 452 (Colo. 2005).

Prosecution's theory that defendant concealed information to illegally obtain a controlled substance did not effect a constructive amendment to charge involving fraud, deceit, and misrepresentation. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

And no substitution of statute prosecution conducted under. Where an information identifies with particularity the exact section of a statute upon which prosecution is based, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution. *Casadas v. People*, 134 Colo. 244, 304 P.2d 626 (1956); *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964).

Nor amendment to charge more serious offense. Where the amended information would charge a different and more serious offense than that which was originally charged, the amend-

ment should not be permitted. *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980).

Language of information is controlling factor. The language of an information charging an offense is the controlling factor in determining whether the amendment was permissible after trial. *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980).

Section (e) is to be liberally construed to allow amendment of an information "as to form or substance at any time prior to trial", and it is within the trial court's discretion to permit the information to be amended. *People v. Wright*, 678 P.2d 1072 (Colo. App. 1984).

Amendment which does not affect charge permitted prior to verdict. An amendment that does not charge an additional or different offense and does not go to the essence of the charge is one of form rather than substance, and it may be permitted at any time prior to verdict. *Collins v. People*, 69 Colo. 353, 195 P. 525 (1920); *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

Where an information contains specific language of the offense underlying an habitual criminal count, a defendant is not prejudiced by amendment of the statutory reference thereto. *People v. Ybarra*, 652 P.2d 182 (Colo. App. 1982); *People v. Stephens*, 689 P.2d 666 (Colo. App. 1984).

No amendment was necessary where the information was sufficient to provide the defendant notice of the charge and defendant's defense was applicable to the offense as stated in the jury instructions. The jury instruction stated that the victim was an at-risk adult, but the count did not specifically refer to § 18-6.5-101, which proscribes crimes against at-risk adults, and the information did not specifically identify the victim as an at-risk adult. However, no amendment was necessary because throughout the trial the prosecution demonstrated its intent to prosecute under the at-risk adult statute and defendant's theory of defense was applicable regardless of how the information stated the elements of the offense. *People v. Valdez*, 946 P.2d 491 (Colo. App. 1997), *aff'd* on other grounds, 966 P.2d 587 (Colo. 1998).

It was not error to allow amendment of habitual criminal count prior to presentation of evidence but after jury was sworn in. *People v. Wandel*, 713 P.2d 398 (Colo. App. 1985).

No abuse of discretion when court permitted district attorney to amend robbery count to add items taken from victim. The amendment did not result in new charges so there was no prejudice to defendant. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

No error committed by allowing the information to be amended on a matter of form. The amendment reduced the number of victims, thereby reducing the likelihood of criminal lia-

bility and benefitting the defendant. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Amendments of form. Changing name of owner of premises in information charging burglary is an amendment of form rather than substance. *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

In prosecutions for larceny, amendments to an information changing the name or description of the owner of the property are of form, not substance, and are allowable during the trial. *Collins v. People*, 69 Colo. 353, 195 P. 525 (1920); *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

An amendment of an information transposing the victim's first and last names is not prejudicial to the defendant, and is one of form rather than substance within the meaning of section (e). *McKee v. People*, 175 Colo. 410, 487 P.2d 1332 (1971).

Amendment of information to add missing words so that defendant could be charged with second degree assault was one of form and was properly allowed by the court. *People v. Cervantes*, 677 P.2d 403 (Colo. App. 1983), *aff'd*, 715 P.2d 783 (Colo. 1986).

And correction of immaterial errors does not require rearraignment. The mere correction of a clerical or other immaterial error in an indictment does not require a second arraignment and plea. *Albritton v. People*, 157 Colo. 518, 403 P.2d 772 (1965).

Allegations of time are substantive in prosecutions under § 18-4-402 (1)(b). Section 18-4-402 (1)(b) (theft of rental property) proscribes only conduct which occurs after the expiration of the rental period specified in a rental agreement. In prosecutions commenced under § 18-4-402 (1)(b), allegations of time are, therefore, substantive allegations — not mere matters of form which may be altered by amendment at any time prior to the rendering of a verdict in the absence of prejudice to the defendant. *People v. Moody*, 674 P.2d 366 (Colo. 1984).

No abuse of discretion in granting motion to amend information where defendant was served with a copy of the written motion four days before trial, he understood the allegations of the amendment, he failed to request a continuance, and he made no showing of prejudice, misunderstanding, or surprise by reason of the time at which the amendment was made. *People v. Thomas*, 832 P.2d 990 (Colo. App. 1991).

Amendment of information at close of evidence was permissible where amendment related to acts occurring within the statutory limitation period, date of offense was neither a material element nor an issue at trial, and the amendment did not involve an altered accusation or require a different defense strategy from the one defendant had chosen under the initial information. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

The people's failure actually to file an amended information after filing a written motion containing all of the allegations that would have been contained in any formal amendment to the information did not result in a lack of jurisdiction, nor was it an error so grave as to require a vacation of the conviction. *People v. Thomas*, 832 P.2d 990 (Colo. App. 1991).

Court's decision to submit to the jury a burglary charge based on unlawful sexual contact instead of the underlying offense of sexual assault was not in error. In this case unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

VIII. SURPLUSAGE.

Averments which are not necessary to a sufficient description of the offense may be stricken as surplusage. *Specht v. People*, 156 Colo. 12, 396 P.2d 838 (1964).

IX. BILL OF PARTICULARS.

Bill not to disclose prosecution's evidence in detail. The purpose of a bill of particulars is not to disclose in detail the evidence upon which the prosecution expects to rely. *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979).

Rather, purpose of a bill of particulars is to define more specifically offense charged. *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965).

A bill of particulars calls for an exposition of the facts that the prosecution intends to prove and limits the proof at trial to those areas described in the bill. *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979).

The purpose of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the indictment, although sufficient to advise the defendant of the charges raised against him, is nonetheless so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial. *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979).

A bill of particulars must provide such information requested by defendant as is necessary for the defendant to prepare his defense and to avoid prejudicial surprise. However, a defendant is not necessarily entitled to receive all the information requested for a bill of particulars. The prosecution need not disclose in detail all evidence upon which it intends to rely. *People v. Lewis*, 671 P.2d 985 (Colo. App. 1983).

It is within the trial court's discretion to

grant or deny motions for bills of particulars, and its action will not be disturbed on writ of error in the absence of an abuse of discretion. *Stewart v. People*, 86 Colo. 456, 283 P. 47 (1929); *Johnson v. People*, 110 Colo. 283, 133 P.2d 789 (1943); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972); *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979); *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Considerations in addressing motion for bill. When addressing motions requesting bills of particulars, the trial judge should consider whether the requested information is necessary for the defendant to prepare his defense and to avoid prejudicial surprise. *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979).

Bill mandatory where crime charged in words of statute. Where the crime of theft is charged in the words of the statute, an order for a bill of particulars is mandatory upon the defendant's request. *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979).

Bill may be denied where information sufficiently advises defendant. There is no abuse of discretion in denying a motion for a bill of particulars where the information sufficiently advises the defendant of the charge he is to meet. *Johnson v. People*, 110 Colo. 283, 133 P.2d 789 (1943); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Bill properly denied where, at the time defendant requested a bill of particulars, several preliminary hearings had already been conducted, and the prosecution had provided the defendant with much of the evidence that was later presented at trial. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Bill cannot aid fundamentally bad indictment. Although the purpose of a bill of particulars is to define more specifically the offense charged, a bill of particulars is not a part of an indictment nor an amendment thereto; it cannot in any way aid an indictment fundamentally bad. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

A bill of particulars under section (g) cannot save an insufficient indictment. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Bill of particulars was sufficient where the defendant was given the specific incidents the prosecution would rely on and the general time frame when the sexual assaults occurred. *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

X. PRELIMINARY HEARING.

Law reviews. For article, "Felony Preliminary Hearings in Colorado", see 17 Colo. Law. 1085 (1988).

Primary purpose of the preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973); *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974); *People v. District Court*, 186 Colo. 136, 526 P.2d 289 (1974); *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978); *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

Preliminary hearing is a screening device to determine whether probable cause exists. *People v. Weaver*, 182 Colo. 221, 511 P.2d 908 (1973); *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973); *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975); *People v. Buhle*, 744 P.2d 747 (Colo. 1987).

The preliminary hearing is a screening device, designed to determine whether probable cause exists to support charges that an accused person committed a particular crime or crimes. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977); *People v. Johnson*, 618 P.2d 262 (Colo. 1980); *Miller v. District Court*, 641 P.2d 966 (Colo. 1982).

The purpose of a preliminary hearing is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant. *Rex v. Sullivan*, 194 Colo. 568, 575 P.2d 408 (1978); *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Evidence to support a conviction is not necessary at a preliminary hearing. *People v. District Court*, 186 Colo. 136, 526 P.2d 289 (1974); *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977); *People v. Johnson*, 618 P.2d 262 (Colo. 1980); *Miller v. District Court*, 641 P.2d 966 (Colo. 1982).

Result of finding probable cause. A finding by the district court that there is probable cause can only have the result that the court shall set the case for arraignment or trial. *People v. District Court*, 186 Colo. 136, 526 P.2d 289 (1974).

This rule sets forth specific requirements which must be met by a defendant in order to obtain a preliminary hearing. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

And opening sentence of section (h) limits applicability of that section to those cases which are instituted in the district court by direct information filed under section (c). *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Proceeding with a preliminary hearing for the sole purpose of preserving the possibility of a direct filing is not good cause for such filing. *People v. Stanchieff*, 862 P.2d 988 (Colo. App. 1993).

The preliminary hearing is not minitrial, but rather is limited to the purpose of determining whether there is probable cause to believe that a crime was committed and that the defendant committed it. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975); *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977); *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977); *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978); *Flores v. People*, 196 Colo. 565, 593 P.2d 316 (1978); *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

The preliminary hearing is not intended to be a minitrial or to afford the defendant an opportunity to effect discovery. *Rex v. Sullivan*, 194 Colo. 568, 575 P.2d 408 (1978); *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978).

And judge not trier of fact. In Colorado, the preliminary hearing is not a "minitrial", and the judge is not a trier of fact; rather, his function is solely to determine the existence or absence of probable cause. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

No consideration of probability of conviction. A preliminary hearing focuses upon a probable cause determination, rather than a consideration of the probability of conviction at the ensuing trial. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

Nor require examination of all prosecution witnesses and evidence. Preliminary hearing does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Merely quantum necessary to establish probable cause. The prosecution need not produce all of its evidence against the defendant at the preliminary hearing, but only that quantum necessary to establish probable cause. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

The probable cause standard requires evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crimes charged. *People v. Johnson*, 618 P.2d 262 (Colo. 1980); *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977); *Miller v. District Court*, 641 P.2d 966 (Colo. 1982); *People in Interest of M.V.*, 742 P.2d, 326 (Colo. 1987).

The prosecution is not required to produce at a preliminary hearing evidence that is sufficient to support a conviction. *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

It is not necessary that the prosecution show beyond a reasonable doubt that the defendant committed the crime; nor is it even necessary to show the probability of the defendant's conviction. *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

Prosecution may seek a grand jury indictment after dismissal by a county court on a preliminary hearing for lack of probable cause as an alternative to appealing to or filing a direct information in the district court. *People v. Noline*, 917 P.2d 1256 (Colo. 1996).

Under subsection (h)(3), the burden of proof is on the prosecution, and the defendant need not testify, although he has the right to cross-examine the witnesses called by the People. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

Although trial judge may curtail the right to cross-examine and to introduce evidence in the preliminary hearing, he may not completely prevent inquiry into matters relevant to the determination of probable cause or disregard the testimony of a witness favorable to the prosecution unless such testimony is implausible or incredible as a matter of law. *People v. Buhrlé*, 744 P.2d 747 (Colo. 1987).

District court may not review county court's probable cause finding. It is not proper for the district court to review the county court's finding of probable cause. *Blevins v. Tihonovich*, 728 P.2d 732 (Colo. 1986).

Rules of evidence and procedure relaxed. In light of its limited purpose, evidentiary and procedural rules in the preliminary hearing in Colorado are relaxed. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

Since the preliminary hearing is not a ministerial, greater evidentiary and procedural latitude is granted to the prosecution to establish probable cause than would be permitted at trial to prove the defendant committed the crime. *People v. Buhrlé*, 744 P.2d 747 (Colo. 1987).

But may not rely solely on hearsay. While the bulk of testimony at a preliminary hearing may be hearsay, the prosecution may not totally rely on hearsay to establish probable cause where competent evidence is readily available. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975); *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978).

Consideration of credibility of witnesses limited. A judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975); *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977); *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

Inferences to be made in favor of prosecution. When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge in a preliminary hearing must draw the inference favorable to the prosecution. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975); *Johns v. District Court*, 192 Colo. 461, 561 P.2d 1 (1977); *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977); *People v. John-*

son, 618 P.2d 262 (Colo. 1980); *Miller v. District Court*, 641 P.2d 966 (Colo. 1982); *People in Interest of M.V.*, 742 P.2d 326 (Colo. 1987).

The right to cross-examine and to introduce evidence may be curtailed by the presiding judge consistent with the screening purpose of the preliminary hearing. *Rex v. Sullivan*, 194 Colo. 568, 575 P.2d 408 (1978).

But judge may not completely curtail inquiry into matters relevant to the determination of probable cause. *Rex v. Sullivan*, 194 Colo. 568, 575 P.2d 408 (1978).

When prohibiting defense from calling witness deemed abuse of discretion. Where an eyewitness is available in court during a preliminary hearing and where the prosecution is relying almost completely on hearsay testimony, it is an abuse of discretion to prohibit the defense from calling the witness. *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978).

And witness' testimony may be used at trial. Where a defendant cross-examined an adverse witness during a preliminary hearing, that witness' recorded testimony might be used as evidence at trial, although the hearing merely determined the existence of probable cause and witness' credibility was not in issue. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977), *rev'd on other grounds*, 196 Colo. 565, 593 P.2d 316 (1978).

Right to hearing founded in statutes, rules, and constitutions. Defendant in requesting and obtaining a preliminary hearing was exercising a right that was not only guaranteed him by statute and rule of court, but also one that has a constitutional foundation. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Protects accused and benefits judiciary. A preliminary hearing protects the accused by avoiding an embarrassing, costly, and unnecessary trial, and it benefits the interests of judicial economy and efficiency. *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

But does not alter proposition that accused entitled to trial on merits. Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

And deemed to be critical stage. A preliminary hearing is a critical stage in the prosecution of a defendant and should not be conducted in a "perfunctory fashion". *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978).

Preliminary hearing is not intended to be mandatory procedural step in every prosecution. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

When waiver occurs. If a defendant does not request a preliminary hearing, he is deemed

to have waived the preliminary hearing and must be bound over for trial. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Effect of waiver. If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

A defendant requesting preliminary hearing must appear. When a defendant requests a preliminary hearing, he has not only the constitutional right to be present, but is under an affirmative obligation and duty to appear at the hearing. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Unless the court permits defendant to waive his presence. The court may, when a timely request is made, permit the defendant to waive his presence at the preliminary hearing if the ends of justice would not be frustrated, but the tactical ploy of refusing to produce a defendant at the preliminary hearing to frustrate the prosecution's case should not be tolerated. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Refusal to appear constitutes implied waiver. Where the judge of the county court advised counsel that the failure of the defendant to appear would constitute a waiver, the defendant's subsequent refusal to appear constituted an implied waiver and extinguished the defendant's right to a preliminary hearing in the county court. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

But application for deferred sentencing does not constitute waiver of the right to a preliminary hearing. *Celestine v. District Court*, 199 Colo. 514 610 P.2d 1342 (1980).

Restoration of right once waived in county court. Under the Colorado Rules of Criminal Procedure and the statutes of this state, a district court is not vested with the power to restore a defendant's statutory right to a preliminary hearing once the defendant had waived that right in county court bind-over proceedings. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Once a defendant knowingly waives his right to a preliminary hearing in the county court, the

right is extinguished and may not be restored in the subsequent district court proceedings. *People ex rel. Farina v. District Court*, 185 Colo. 118, 522 P.2d 589 (1974).

Authority to bind over on lesser included offense. The trial court which holds the preliminary hearing has the authority to bind over the defendant on a lesser included offense. *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

When juvenile not entitled to preliminary hearing in district court. A juvenile who was transferred to the district from the juvenile court, after a transfer hearing where probable cause as to the offenses charged was determined, was not entitled in the district court to another determination of probable cause in the form of a preliminary hearing. *People v. Flanigan*, 189 Colo. 43, 536 P.2d 41 (1975).

Defendant cannot complain if he is committed to a state institution until he is competent to have a preliminary hearing, pursuant to a sanity proceeding, since subsection (h)(2), provides that the preliminary hearing "shall be held within 30 days of the day of the setting, unless good cause for continuing the hearing beyond that time be shown to the court", and the matter of the defendant's sanity is good cause. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

The bulk of evidence in a preliminary hearing may consist of hearsay evidence which would be inadmissible at the trial. *People v. Buhrle*, 744 P.2d 747 (Colo. 1987).

Rehearing not provided. There is no provision in this rule for rehearing on, or reconsideration of, a ruling on completion of a preliminary hearing. *People v. District Court*, 186 Colo. 136, 526 P.2d 289 (1974).

Where technical difficulties prevented defendant from obtaining a transcript of the preliminary hearing, the judge abused his discretion in denying defendant's motion for a second preliminary hearing. Such motion should have been granted because the testimony presented at the first preliminary hearing was directly relevant and significant to defendant's trial preparation, the prosecution was expected to rely on testimony presented at the preliminary hearing, and there was no alternative method of reconstructing the testimony from the preliminary hearing. *Harris v. District Court*, 843 P.2d 1316 (Colo. 1993).

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses.

(1) **Mandatory Joinder.** If several offenses are actually known to the prosecuting attorney at the time of commencing the prosecution and were committed within his judicial district, all such offenses upon which the prosecuting attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any such offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution; except that, if at

the time jeopardy attaches with respect to the first prosecution against the defendant, the defendant or counsel for the defendant actually knows of additional pending prosecutions that this subsection (a)(1) requires the prosecuting attorney to charge and the defendant or counsel for the defendant fails to object to the prosecution's failure to join the charges, the defendant waives any claim pursuant to this subsection (a)(1) that a subsequent prosecution is prohibited.

(2) **Permissive Joinder.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment, information, or felony complaint if they are alleged to have participated in the same act or series of acts arising from the same criminal episode. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Source: (a) amended December 6, 1990, and effective March 1, 1991; entire rule amended and adopted September 12, 2002, effective January 1, 2003.

ANNOTATION

- I. General Consideration.
- II. Joinder of Offenses.
- III. Joinder of Defendants.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Applied in *People v. Mendoza*, 190 Colo. 519, 549 P.2d 766 (1976); *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976); *Brutcher v. District Court*, 195 Colo. 579, 580 P.2d 396 (1978); *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *People v. Holder*, 632 P.2d 607 (Colo. App. 1981).

II. JOINDER OF OFFENSES.

When joinder of offenses permitted. This rule provides that two or more offenses may be charged in the same information, in a separate count for each offense, if the offenses charged are based upon the same act or transaction, or on two or more acts or transactions connected together and that they were properly charged in separate counts for each offense. *Ruark v. People*, 158 Colo. 287, 406 P.2d 91 (1965).

Where the acts involved were committed at the same time or in immediate succession and at the same place, they arose out of the same criminal episode; therefore, it is appropriate to include the separate counts in a single information. *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981).

Purpose of joinder is to prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the same criminal episode. *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

"Single prosecution" is a proceeding from the commencement of the criminal action until further prosecution is barred. *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

Rule 8(a) applies only where prosecution aware of other offenses. Section (a) of this rule and § 18-1-408 (2) apply only where the prosecution is aware of other offenses at the time the original action is commenced. *People v. Scott*, 615 P.2d 680 (Colo. 1980).

Jeopardy must attach before there is "subsequent prosecution". The proscription contained in section (a) is against bringing a "subsequent prosecution" based on charges known to the prosecutor at the time he commenced the initial prosecution, and there is no "subsequent prosecution" until jeopardy attaches to the initial prosecution. *People v. Freeman*, 196 Colo. 238, 583 P.2d 921 (1978).

Guilty plea to related charge bars subsequent prosecution. Section (a) and § 18-1-408 (2), bar the prosecution of a defendant for two pending charges arising out of the same criminal episode when the defendant has pleaded guilty and has been sentenced for a third related charge. *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

Effect of dismissal on attachment of jeopardy. Where dismissal of a count occurred prior to trial and the dismissal had nothing to do with the defendant's criminal liability, jeopardy does not attach. *People v. Freeman*, 196 Colo. 238, 583 P.2d 921 (1978).

In joinder of offenses of similar character, prejudice may develop because defendant's statements concerning his involvement in one count would not ordinarily be admissible at a separate trial of the second count, since it is related to the other count only as a crime of a similar nature. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

Nearness in time, proximity of place and unity of scheme are not indispensable prerequisites to joinder under the "same criminal episode" standard, although multiple offenses characterized by all three components would certainly qualify for joinder under section (a). *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Law of joinder and severance dependent on facts in each case. The law relating to joinder and severance and that which permits consolidation of charges depends on the facts in each particular case. *Hunter v. District Court*, 193 Colo. 308, 565 P.2d 942 (1977).

Where joinder permitted in sanity trial. Joinder of a charge of forcible rape with an unrelated deviate sexual intercourse charge committed on a different female on a different date for purposes of trial on the sanity issue was not error. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

But accessory charge barred if not included in first information. The prosecution is precluded from pursuing a second prosecution where the accessory charge could have been included in the first information. *People v. Riddick*, 626 P.2d 641 (Colo. 1981).

Joinder of offenses permitted. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973).

Where two assault counts arose out of the same continuous sequence of events closely related in time and distance, the two counts were "based on two acts connected together", and the trial judge was not obligated to sever them at trial. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975).

Joinder not sanctioned. Where the alleged victims of the crimes are the same, but the same persons are not charged in each offense and material differences exist as to the date of each offense and the factual transactions specified in each count, joinder under such circumstances is not sanctioned by *Crim. P. 8(a)*. *Norman v. People*, 178 Colo. 190, 496 P.2d 1029 (1972).

To be duplicitous, information must join two or more distinct and separate offenses in the same count of an indictment or information. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957); *Leyba v. People*, 174 Colo. 1, 481 P.2d 417 (1971).

Count is not bad for duplicity where it sets forth several overt acts in pursuance of the principal act charged, or where it alleges several acts done by the same person which are only successive stages in the progress of a criminal enterprise, constituting as a whole only one offense, although either, when done alone, might be an offense. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957).

Rule authorizes the joinder of offenses based on a series of acts arising from the same criminal episode. Joinder of offenses committed at different times and places is permissible pro-

vided they are part of a schematic whole. *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Sexual assault offenses may be joined if the evidence of each offense would be admissible in separate trials. *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

Separate offenses may be joined that are committed at different times and places if they constitute part of a schematic whole. The incident at the grocery store and subsequent shopping spree were a continuous criminal episode and there was no prejudice to the defendant in trying the counts together. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

Trial court did not abuse discretion by denying motion to sever when the attempted manslaughter charge (having unprotected intercourse while HIV positive) arose from the same act as the sexual assault charges. *People v. Demby*, 91 P.3d 431 (Colo. App. 2003).

A defendant does not impliedly waive his right to rely upon the statute and rule by entering a plea of guilty in a county court case with knowledge that the district court case is pending. *People v. Robinson*, 774 P.2d 884 (Colo. 1989).

But the right to compulsory joinder may be waived by raising the issue after jeopardy attaches in the second prosecution. *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991); *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

III. JOINDER OF DEFENDANTS.

Law reviews. For article, "Pronouncements of the U. S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a recent case relating to misjoinder of defendants, see 15 *Colo. Law.* 1615 (1986).

By consenting to a joint trial defendant waives any right to urge a later objection thereto based solely on the joinder. *Pineda v. People*, 152 Colo. 545, 383 P.2d 793 (1963).

Considerations in granting motion for severance. When deciding whether to grant a motion for severance, the trial court should consider whether evidence inadmissible against one defendant will be considered against the other defendant, despite the issuance by the trial court of the proper admonitory instructions. An additional consideration is whether the defendants plan to offer antagonistic defenses. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979).

Severance required if joinder prevents fair trial. When joint prosecution would prevent a fair trial of one or more of the defendants, the trial court must grant a motion for severance. *People v. Magoon*, 645 P.2d 286 (Colo. App. 1982).

Motion for severance is addressed to the sound discretion of trial court. *People v. Magoon*, 645 P.2d 286 (Colo. App. 1982).

And not disturbed on appeal absent prejudice. A ruling on a motion for severance will not be disturbed on appeal in the absence of a

showing that the denial of such motion prejudiced a defendant. *People v. Magoon*, 645 P.2d 286 (Colo. App. 1982).

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

(1) **When Issued.** Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall request the court to order that a warrant shall issue for the arrest of the defendant, or that a summons shall issue and be served upon the defendant.

(2) **Affidavits or Sworn Testimony.** If a warrant is requested upon an information, the information must contain or be accompanied by a sworn written statement of facts establishing probable cause to believe that a criminal offense has been committed and that the offense was committed by the person for whom the warrant is sought. In lieu of such sworn statement, the information may be supplemented by sworn testimony of such facts. Such testimony must be transcribed and then signed under oath or affirmation by the witness giving the testimony.

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, and in unclassified felonies punishable by a maximum penalty of more than ten years whenever an indictment is returned or an information has been filed prior to the arrest of the person named as defendant therein, the court, with the consent of the prosecuting attorney, shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest.

(4) **Standards Relating to Issuance of Summons.** The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

- (I) The defendant's residence;
- (II) The defendant's employment;
- (III) The defendant's family relationships;
- (IV) The defendant's past history of response to legal process; and
- (V) The defendant's past criminal record.

(b) Form.

(1) **Warrant.** The form of the warrant shall be as provided in Rule 4(b)(1), except that it shall be signed by the clerk, it shall identify the nature of the offense charged in the indictment or information, and it shall command that the defendant be arrested and brought before the court unless he shall be admitted to bail as otherwise provided in these Rules.

(2) **Summons.** The summons shall be in the same form as provided in Rule 4(b)(2).

(c) Execution or Service and Return.

(1) **Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(c). The officer executing the warrant shall bring the arrested person before the court without unnecessary delay, or for the purposes of admission to bail, before the clerk of the court, the sheriff of the county where the arrest occurs, or any other officer authorized to admit to bail.

(2) **Return.** The peace officer executing a warrant shall make a return thereof to the court. At the request of the prosecuting attorney, any unexecuted warrant shall be returned and cancelled. At least one day prior to the return day, the person to whom a summons was delivered for service shall make return thereof. At the request of the prosecuting attorney made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved, or a duplicate thereof may be delivered by the clerk to any peace officer or other authorized person for execution or service.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

Following preliminary proceedings pursuant to the provisions of Rules 5, 7, and 12, the arraignment shall be conducted in open court, informing the defendant of the offense with which he is charged, and requiring him to enter a plea to the charge. The defendant shall be arraigned in the court having trial jurisdiction in which the indictment, information, or complaint is filed, unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court.

(a) If the offense charged is a felony or a class 1 misdemeanor, or if the maximum penalty for the offense charged is more than one year's imprisonment, the defendant must be personally present for arraignment, except that the court for good cause shown may accept a plea of not guilty made by an attorney representing the defendant without requiring the defendant to be personally present.

(b) In all other cases the court may permit arraignment without the presence of the defendant. If a plea of guilty or nolo contendere is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(c) Upon arraignment, the defendant or his counsel shall be furnished with a copy of the indictment or information, complaint, or summons and complaint if one has not been previously served.

(d) A record shall be made of the proceedings at every arraignment.

(e) If the defendant appears without counsel at an arraignment, the information, indictment, or complaint shall be read to him by the court or the clerk thereof. If the defendant appears with counsel, the information or indictment need not be read and no waiver of said reading is necessary.

(f) As soon as the jury panel is drawn which will try the case, a list of the names and addresses of the jurors on the panel shall be made available by the clerk of the court to defendant's counsel, and if the defendant has no counsel, the list shall be served on him personally or by certified mail. It shall not be necessary to serve a list of jurors upon the defendant at the time of arraignment.

ANNOTATION

No arraignment required in certain criminal contempts. In criminal contempt cases, no arraignment is required, at least with respect to those criminal contempts which are analogous to petty offenses. *Robran v. People ex rel. Smith*, 173 Colo. 378, 479 P.2d 976 (1971).

Correction of immaterial error in indictment does not require rearraignment. The mere correction of a clerical or other immaterial error in an indictment does not require a second arraignment and plea. *Albritton v. People*, 157 Colo. 518, 403 P.2d 772 (1965).

The denial of a motion to dismiss for failure to rearraign on an amended information is not

error where the amendment is not one of substance, and where, when counsel calls the court's attention to it during the course of the trial, the trial court follows the provision of Rule 11(d), C.R. Crim. P., and enters a plea of not guilty and, thereupon, the trial proceeds. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

It is essential that the record show affirmatively an arraignment. *Wright v. People*, 22 Colo. 143, 43 P. 1021 (1896).

Rule 11. Pleas

(a) **Generally.** A defendant personally or by counsel may plead guilty, not guilty, not guilty by reason of insanity (in which event a not guilty plea may also be entered), or with the consent of the court, nolo contendere.

(b) **Pleas of Guilty and Nolo Contendere.** The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all the rights set forth in Rule 5(a)(2) and also determining:

(1) That the defendant understands the nature of the charge and the elements of the offense to which he is pleading and the effect of his plea;

(2) That the plea is voluntary on defendant's part and is not the result of undue influence or coercion on the part of anyone;

(3) That he understands the right to trial by jury and that he waives his right to trial by jury on all issues;

(4) That he understands the possible penalty or penalties;

(5) That the defendant understands that the court will not be bound by any representations made to the defendant by anyone concerning the penalty to be imposed or the granting or the denial of probation, unless such representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report, if any;

(6) That there is a factual basis for the plea. If the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement, and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads;

(7) That in class 1 felonies, or where the plea of guilty is to a lesser included offense, a written consent shall have been filed with the court by the district attorney.

(c) **Misdemeanor Cases.** In all misdemeanor cases except class 1, the court may accept, in the absence of the defendant, any plea entered in writing by the defendant or orally made by his counsel.

(d) **Failure or Refusal to Plead.** If a defendant refuses to plead, or if the court refuses to accept a plea of guilty, or a plea of nolo contendere, or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason the arraignment here provided for has not been had, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

(e) **Defense of Insanity.**

(1) The defense of insanity must be pleaded at the time of arraignment, except that the court for good cause shown may permit such plea to be entered at any time before trial. It must be pleaded orally, either by the defendant or by his counsel, in the form, "not guilty by reason of insanity". A defendant who does not thus plead not guilty by reason of insanity shall not be permitted to rely on insanity as a defense as to any accusation of any crime; provided, however, that evidence of mental condition may be offered in a proper case as bearing upon the capacity of the accused to form specific intent essential to the commission of a crime. The plea of not guilty by reason of insanity includes the plea of not guilty.

(2) If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant, but the defendant refuses to permit the entry of such plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter such plea on behalf of the defendant, and the plea so entered shall have the same effect as though it had been voluntarily entered by the defendant himself.

(3) If there has been no grand jury indictment or preliminary hearing prior to the entry of the plea of not guilty by reason of insanity, the court shall hold a preliminary hearing prior to the trial of the insanity issue. If probable cause is not established the case shall be dismissed, but the court may order the district attorney to institute civil commitment proceedings if it appears that the protection of the public or the accused requires it.

(f) **Plea Discussions and Plea Agreements.**

(1) Where it appears that the effective administration of criminal justice will thereby be served, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for or refuses appointment of counsel and has not retained counsel.

(2) The district attorney may agree to one of the following depending upon the circumstances of the individual case:

(I) To make or not to oppose favorable recommendations concerning the sentence to be imposed if the defendant enters a plea of guilty or nolo contendere;

(II) To seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to the defendant's conduct;

(III) To seek or not to oppose the dismissal of other charges or not to prosecute other potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(3) Defendants whose situations are similar should be afforded similar opportunities for plea agreement.

(4) The trial judge shall not participate in plea discussions.

(5) Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel or defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions.

(6) Except as to proceedings resulting from a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his defense counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceeding.

ANNOTATION

I. General Consideration.

II. Pleas of Guilty and Nolo Contendere.

III. Misdemeanor Cases.

IV. Failure or Refusal to Plead.

V. Defense of Insanity.

VI. Plea Bargaining.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see 11 Colo. Law. 1225 (1982).

Prosecutor should discuss pleas with defense counsel. A prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by pleas. *Dabbs v. People*, 175 Colo. 273, 486 P.2d 1053 (1971).

And court should allow changes of, and additions to, pleas. Where good cause is shown, it is incumbent upon the trial court to allow changes of plea or additional pleas to accomplish the fair and just determination of criminal charges. *Perez v. People*, 176 Colo. 505, 491 P.2d 969 (1971).

Through a plea agreement accepted by the trial court, a defendant may preserve the right to appeal a suppression ruling while entering a conditional plea of guilty. *People v. Bachofer*, 85 P.3d 615 (Colo. App. 2003); *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Neither the Colorado statutes nor the Colorado rules of criminal procedure prohibit conditional pleas. The obvious advantages of a conditional plea procedure are not outweighed

by any significant or compelling disadvantages. A conditional plea is particularly effective when the issue preserved for appeal is dispositive of the case. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

It is essential that the record show a plea. *Wright v. People*, 22 Colo. 143, 43 P. 1021 (1896).

The decision to enter a guilty plea or withdraw a guilty plea is one of the few fundamental choices that must be decided by the defendant alone. *People v. Davis*, 2012 COA 1, __ P.3d __.

Applied in *McClendon v. People*, 175 Colo. 451, 488 P.2d 556 (1971); *Romero v. District Court*, 178 Colo. 200, 496 P.2d 1049 (1972); *People v. Baca*, 179 Colo. 156, 499 P.2d 317 (1972); *Hyde v. Hinton*, 180 Colo. 324, 505 P.2d 376 (1973); *People v. Kelly*, 189 Colo. 31, 536 P.2d 39 (1975); *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975); *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975); *People v. Arnold*, 190 Colo. 193, 544 P.2d 968 (1976); *People v. Banks*, 190 Colo. 295, 545 P.2d 1356 (1976); *People v. Smith*, 190 Colo. 449, 548 P.2d 603 (1976); *People v. Worsley*, 191 Colo. 351, 553 P.2d 73 (1976); *People v. Carino*, 193 Colo. 412, 566 P.2d 1061 (1977); *People v. Cole*, 39 Colo. App. 323, 570 P.2d 8 (1977); *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978); *People v. Palmer*, 42 Colo. App. 460, 595 P.2d 1060 (1979); *People v. Weber*, 199 Colo. 25, 604 P.2d 30 (1979); *People v. Baca*, 44 Colo. App. 167, 610 P.2d 1083 (1980); *People v. Adargo*, 622 P.2d 593 (Colo.

App. 1980); *People v. Horton*, 628 P.2d 117 (Colo. App. 1980); *People v. Shaver*, 630 P.2d 600 (Colo. 1981); *State v. Laughlin*, 634 P.2d 49 (Colo. 1981); *People v. Marquez*, 644 P.2d 59 (Colo. App. 1981); *People v. Velasquez*, 641 P.2d 943 (Colo. 1982); *Crocker v. Colo. Dept. of Rev.*, 652 P.2d 1067 (Colo. 1982); *People v. Volland*, 643 P.2d 800 (Colo. App. 1982); *People v. M.A.W.*, 651 P.2d 433 (Colo. App. 1982); *People v. Ramirez*, 652 P.2d 1077 (Colo. App. 1982); *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982); *Flower v. People*, 658 P.2d 266 (Colo. 1983); *People v. Akins*, 662 P.2d 486 (Colo. 1983).

II. PLEAS OF GUILTY AND NOLO CONTENDERE.

Law reviews. For article, "Collateral Effects of a Criminal Conviction in Colorado", see 35 Colo. Law. 39 (June 2006). For comment, "Ineffective Assistance of Counsel Under *People v. Pozo*: Advising Non-Citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements", see 80 Colo. L. Rev. 793 (2009).

Defendant's guilty plea was unconstitutional since he was illiterate, was told by the interpreter to sign the plea advisement form without having it read to him, had difficulty hearing the interpreter during the plea hearing, was pro se, and lacked the knowledge or understanding of the criminal justice system and process. The guilty plea was not made based on a voluntary and intelligent choice among alternative courses of action. *Sanchez-Martinez v. People*, 250 P.3d 1248 (Colo. 2011).

This rule sets forth required guidelines for the entry of a plea upon arraignment. *People v. Marsh*, 183 Colo. 258, 516 P.2d 431 (1973).

This rule itemizes certain requirements which must be followed by a court before it may accept a plea of guilty or one of nolo contendere. *People v. Van Hook*, 36 Colo. App. 226, 539 P.2d 507 (1975).

Purpose of section (b). Section (b) contemplates that the transcribed colloquy between the court and the defendant will eliminate the need to resort to a subsequent fact-finding proceeding in order to determine whether a guilty plea was voluntarily and understandingly made. *People v. Quintana*, 634 P.2d 413 (Colo. 1981).

Judge to determine fulfillment of certain conditions before accepting plea. Section 16-7-207 and section (b) of this rule require that a trial court must make certain determinations before it accepts a plea of guilty or a plea of nolo contendere. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975); *People v. Gleason*, 180 Colo. 71, 502 P.2d 69 (1972); *Laughlin v. State*, 44 Colo. App. 341, 618 P.2d 689 (1980), rev'd on other grounds, 634 P.2d 49 (Colo. 1981).

Trial courts must adhere strictly to the requirements of this rule when pleas of guilty are being considered. *People v. Sandoval*, 188 Colo. 431, 535 P.2d 1120 (1975).

As a valid plea of guilty waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial by jury. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

But compliance not shown by use of printed form. Compliance with this rule cannot be demonstrated solely by reliance upon a printed form. *People v. Van Hook*, 36 Colo. App. 226, 539 P.2d 507 (1975).

And formal ritual is not required by this rule. *People v. Duran*, 183 Colo. 180, 515 P.2d 1117 (1973); *People v. Marsh*, 183 Colo. 258, 516 P.2d 431 (1973).

Satisfaction of this rule does not require that a prescribed ritual or wording be employed, but rather the substance of the circumstances surrounding the plea should prevail over form. *People v. Edwards*, 186 Colo. 129, 526 P.2d 144 (1974); *People v. Cushon*, 650 P.2d 527 (Colo. 1982).

The overriding consideration in analyzing a record pertaining to a guilty plea or a plea of nolo contendere is that a set ritual is not required. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

A trial court is not required to follow any particular formula for advising a defendant at a preliminary hearing. *People v. Thimmes*, 643 P.2d 778 (Colo. App. 1981).

So that reading charge may be sufficient. Where the language of a charge is not highly technical, the reading of the charge is sufficient explanation. *People v. Wright*, 662 P.2d 489 (Colo. App. 1982), aff'd, 690 P.2d 1257 (Colo. 1984); *People v. Muniz*, 667 P.2d 1377 (Colo. 1983); *People v. Cabral*, 698 P.2d 234 (Colo. 1985); *People v. Wilson*, 708 P.2d 792 (Colo. 1985) (term "feloniously" sufficiently informed defendant of mens rea element of the offense of rape); *People v. Trujillo*, 731 P.2d 649 (Colo. 1986).

Effect of noncompliance with rule. Where rule is not complied with, the defendant's conviction will be reversed and the cause will be remanded to the trial court to set aside the plea and to rearraign the defendant. *People v. Golden*, 184 Colo. 311, 520 P.2d 127 (1974); *People v. Baca*, 186 Colo. 95, 525 P.2d 1146 (1974).

Failure of trial court to advise or to make a proper inquiry precludes treating the defendant's plea of guilty as a voluntary and intelligent waiver of his constitutional rights, so defendant may withdraw his plea of guilty and be permitted to plea anew. *People v. Harrington*,

179 Colo. 312, 500 P.2d 360 (1972); *People v. Gleason*, 180 Colo. 71, 502 P.2d 69 (1972).

Failure of the trial court to comply with each requirement of this rule affords defendants the opportunity to later challenge the trial court's refusal to permit a withdrawal of a guilty plea. *People v. Sandoval*, 188 Colo. 431, 535 P.2d 1120 (1975).

Without showing of compliance, guilty plea not acceptable. Without an affirmative showing of compliance with the mandatory provisions of this rule, a plea of guilty cannot be accepted, and any judgment and sentence which is entered following the plea is void. *Martinez v. People*, 152 Colo. 521, 382 P.2d 990 (1963); *Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971); *People v. Randolph*, 175 Colo. 454, 488 P.2d 203 (1971).

Thus, conduct of proceedings to appear in record. The conduct of proceedings under this rule must affirmatively appear in the record, since an appellate court cannot presume a waiver of constitutional rights from a silent record. *People v. Brewer*, 648 P.2d 167 (Colo. App. 1982).

But lack of precise language not grounds for reversal. If the record reflects that the trial court had assured itself that defendant's plea was voluntary and intelligently entered with full knowledge of the nature and elements of the offense and of the waiver of his rights as an accused person, then lack of precise language in the record expressing these things is not of itself a valid reason to reverse acceptance of a plea of *nolo contendere*. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

Test for proper plea advisement. In deciding if a plea advisement was proper, the dispositive issue is whether the constitutional requirements of voluntariness then in effect were met. *People v. Wright*, 662 P.2d 489 (Colo. App. 1982), *aff'd*, 690 P.2d 1257 (Colo. 1984).

Record must show factual basis for plea. A guilty plea cannot be accepted if the record lacks an affirmative showing of a factual basis. *People v. Cushon*, 631 P.2d 1164 (Colo. App. 1981), *rev'd on other grounds*, 650 P.2d 527 (Colo. 1982).

As guilty plea cannot stand if it lacks a factual basis and is not voluntary and accurate. *People v. Alvarez*, 181 Colo. 213, 508 P.2d 1267 (1973); *People v. Hutton*, 183 Colo. 388, 517 P.2d 392 (1973).

Nor may *nolo contendere* plea. *Nolo contendere* plea that is voluntarily and understandingly made, with a factual basis that appears in the record, should be upheld. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Although court not required to ascertain factual basis for *nolo contendere* plea. There is no requirement that a court ascertain that there is a factual basis for a plea of *nolo con-*

tendere when such a plea is permitted. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Entering of guilty plea to lesser charge does not automatically waive factual basis requirement of subsection (b)(6). *People v. Cushon*, 631 P.2d 1164 (Colo. App. 1981), *rev'd on other grounds*, 650 P.2d 527 (Colo. 1982).

Record must affirmatively show that accused understandingly and voluntarily waived his constitutional rights. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

Compliance with this rule requires that there be an adequate basis in the record to support a determination by the court that the defendant understands the nature of the charge to which he is pleading guilty. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Compliance with this rule creates an adequate record to support a determination by both the arraignment court and a reviewing court of the defendant's understanding of the crime to which a plea is tendered. *People v. Leonard*, 673 P.2d 37 (Colo. 1983).

Even when the defendant or his attorney waives the formal reading of the information, such waiver does not serve to dispense with the express mandate of this rule that the court not accept the plea of guilty without first determining that the defendant understands the nature of the charge. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Silent record insufficient. Where there are no facts in the record to establish the defendant's complete understanding of the nature of the offense with which he is charged, then, when the state attempts to prove waiver of such knowledge, it bears a heavy burden, and a silent record will not suffice. *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972).

Application of *Boykin v. Alabama*. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), holding that waiver of the privilege against self-incrimination, of the right to trial by jury, and of the right to confrontation cannot be presumed by a silent record, is given only prospective application. *People v. Crater*, 182 Colo. 248, 512 P.2d 623 (1973); *People v. Edwards*, 186 Colo. 129, 526 P.2d 144 (1974); *People v. Malouff*, 721 P.2d 159 (Colo. App. 1986).

Record held to show defendant's knowing and intelligent waiver of rights. *People v. Chavez*, 650 P.2d 1310 (Colo. App. 1982); *People v. Chavez*, 730 P.2d 321 (Colo. 1986); *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

Trial court's failure to explain elements of second degree burglary was cured by evidence in record showing defendant understood and had knowledge of elements of second degree burglary. *Wieder v. People*, 722 P.2d 396 (Colo. 1986).

While the court gave a proper advisement under this rule, it did not specifically evaluate the totality of the circumstances surrounding juvenile defendant's waiver of critical constitutional rights. After applying the totality of circumstances standard, defendant did not knowingly and voluntarily waive his constitutional rights when he entered a guilty plea. *People v. Simpson*, 51 P.3d 1022 (Colo. App. 2001), rev'd on other grounds, 69 P.3d 79 (Colo. 2003).

Guilty plea must be voluntarily and intelligently given. In order for a court to accept a plea of guilty, there must be an affirmative showing that it was given voluntarily and intelligently. *Martinez v. Ricketts*, 498 F. Supp. 893 (D. Colo. 1980); *People v. Drake*, 785 P.2d 1257 (1990).

A plea of guilty, to be valid, must be intelligently made. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

For a waiver of such the fundamental rights which results from the acceptance of a guilty plea, a defendant must voluntarily, knowingly, and intentionally relinquish those rights. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

A plea of guilty must be entered voluntarily and with full understanding of the essential elements of the offense to withstand constitutional scrutiny. *People v. Cisneros*, 665 P.2d 145 (Colo. App. 1983).

Defendant who is subject to sentencing act must be informed of the penalties under such act prior to acceptance of guilty plea or else the plea cannot be voluntarily and understandingly entered. *People v. Sutka*, 713 P.2d 1326 (Colo. App. 1985).

Defendant entered a guilty plea without being informed that he could receive an aggravated range sentence. Consequently, defendant's plea was not given voluntarily and intelligently and did not satisfy due process. *People v. Corral*, 179 P.3d 837 (Colo. App. 2007).

Due process of law mandates that a guilty plea must be voluntary and understandingly made before a valid judgment can be entered thereon. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Test whether plea intelligently and voluntarily made. When determining whether pleas of guilty were intelligently and voluntarily entered, the test to be applied is that a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the

prosecutor's business (e.g. bribes). *Ward v. People*, 172 Colo. 244, 472 P.2d 673 (1970); *England v. People*, 175 Colo. 236, 486 P.2d 1055 (1971); *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971); *People v. Mason*, 176 Colo. 544, 491 P.2d 1383 (1971); *People v. Cumby*, 178 Colo. 31, 495 P.2d 223 (1972); *Bresnahan v. Patterson*, 352 F. Supp. 1180 (D. Colo. 1973); *People v. Musser*, 187 Colo. 198, 529 P.2d 626 (1974).

However, every relevant factor need not be correctly assessed. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. *Simms v. People*, 175 Colo. 191, 486 P.2d 22 (1971).

Defendant must understand elements of offense and his rights. Rather than any ritualistic formalism, this rule requires only that a defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt after being made aware of his various rights. *People v. Marsh*, 183 Colo. 258, 516 P.2d 431 (1973).

The constitution requires that the defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt when pleading guilty, but a formalistic recitation by the trial judge at a providency hearing is not a constitutional requisite. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973); *People v. Duran*, 183 Colo. 180, 515 P.2d 1117 (1973); *People v. Keenan*, 185 Colo. 317, 524 P.2d 604 (1974).

No guilty plea can be deemed valid unless a defendant understands the nature and elements of the crime with which he stands charged. *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972); *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974); *People v. Keenan*, 185 Colo. 317, 524 P.2d 604 (1974); *People v. Sanders*, 185 Colo. 356, 524 P.2d 299 (1974); *People v. Brown*, 187 Colo. 244, 529 P.2d 1338 (1974); *People v. Murdock*, 187 Colo. 418, 532 P.2d 43 (1975); *Harshfield v. People*, 697 P.2d 391 (Colo. 1985); *People v. Wade*, 708 P.2d 1366 (Colo. 1985); *People v. Cisneros*, 824 P.2d 16 (Colo. App. 1991).

A guilty plea cannot stand as voluntarily and knowingly entered unless the defendant understands the nature of the crime charged, and this requirement is not met unless the critical elements of the crime charged are explained in terms which are understandable to the defendant. *People v. Gorniak*, 197 Colo. 289, 593 P.2d 349 (1979).

As well as consequences of guilty plea. Every defendant that stands at the bar of justice charged with a crime must be advised and must know what the possible consequences are of his tendered plea of guilty. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

A plea of guilty must be a genuine one by a defendant who is guilty and who understands his situation, his rights, and the consequences of his plea, and is neither deceived nor coerced. *Westendorf v. People*, 171 Colo. 123, 464 P.2d 866 (1970).

A defendant must be advised of the pertinent fundamental constitutional rights and must understand the consequences of a guilty plea for him to voluntarily and understandingly enter such a plea and waive the right to a jury trial. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

And trial judge must determine that defendant understands nature of offense with which he stands charged. *People v. Riney*, 176 Colo. 221, 489 P.2d 1304 (1971); *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972); *People v. Keenan*, 185 Colo. 317, 524 P.2d 604 (1974); *People v. Sanders*, 185 Colo. 356, 524 P.2d 299 (1974).

And consequences of act. Prior to the acceptance of a guilty plea the trial court must be assured that the defendant is fully aware of the consequences of his act. *People v. Brown*, 187 Colo. 244, 529 P.2d 1338 (1974).

Colorado law does not contemplate an increase in the statutory maximum sentence to which a defendant has subjected himself by pleading guilty, based on subsequent jury findings, which are the functional equivalent of elements of a greater offense than the one to which he pled. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Violation of requirement that defendant understand the effects of his plea occurs if consideration of subsequent jury findings is allowed to increase defendant's maximum sentence. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Court's determination may be implied. Where the trial judge advises the defendant that his plea has to be voluntary and that any promises which have been made are not binding on the court, but judge fails to ask the defendant whether any such promises or coercion were involved in his decision to plead guilty, implicit in the court's acceptance of the guilty plea is its determination that the plea was intelligently and voluntarily entered. *People v. Derrerra*, 667 P.2d 1363 (Colo. 1983).

Mere assertion of understanding of charge does not satisfy rule. The mere assertion of understanding of a charge by the defendant does not satisfy either the letter or spirit of this rule, but it must be clear, in fact, that the defendant understands the elements of the charge. *People v. Sanders*, 185 Colo. 356, 524 P.2d 299 (1974).

Court to explain elements of crime and meaning of guilty plea. The requirement of understanding is not met unless critical elements of crime charged are explained in terms understandable to the defendant and unless

meaning of guilty plea is explained in relation to each of such elements. *People v. Gleason*, 180 Colo. 71, 502 P.2d 69 (1972); *People v. Brown*, 187 Colo. 244, 529 P.2d 1338 (1974); *People v. Van Hook*, 36 Colo. App. 226, 539 P.2d 507 (1975); *People v. Steelman*, 200 Colo. 177, 613 P.2d 334 (1980); *People v. Wiegard*, 709 P.2d 81 (Colo. App. 1985); *Waits v. People*, 724 P.2d 1329 (Colo. 1986).

And reading simply worded information may suffice. By reading an information, which is couched in language which is easily understandable to a person with ordinary intelligence and by inquiring into the defendant's understanding of the charge before a plea of guilty was accepted, the trial judge satisfied the requirements of this rule. *People v. Lottie*, 183 Colo. 308, 516 P.2d 430 (1973).

In explaining the critical elements of the charge to the defendant, unless the language of the charge is highly technical, no more full explanation of the substantive crime could be given than the charge itself. *People v. Gorniak*, 197 Colo. 289, 593 P.2d 349 (1979); *People v. Moore*, 636 P.2d 1290 (Colo. App. 1981); *People v. Wiegard*, 709 P.2d 81 (Colo. App. 1985).

Where language was readily understandable by person of average intelligence and defendant affirmatively acknowledged he understood nature of charge, reading of information was sufficient. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

The court is not required to advise a non-English speaking defendant that an official interpreter may be utilized for communication with the defendant's attorney. *People v. Ochoa-Magana*, 36 P.3d 141 (Colo. App. 2001).

If defendant enters guilty plea under mistaken assurance that defendant's immigration status would not be affected by guilty plea, then plea may not have been made knowingly, voluntarily, and intelligently. *People v. Nguyen*, 80 P.3d 903 (Colo. App. 2003).

Explanation of "unlawful act" more properly described burglary than the trespass with which the defendant was charged but the court concluded that it adequately apprised the defendant of the necessary elements of first degree criminal trespass. *People v. Wood*, 844 P.2d 1299 (Colo. App. 1992).

Court must also explain attendant waiver of rights. In accordance with this rule, the trial court must make certain, by inquiry of the defendant, that he understands that the guilty plea stands as a waiver of nearly all of his rights as guaranteed by the fifth and sixth amendments to the United States Constitution. *People v. Sandoval*, 188 Colo. 431, 535 P.2d 1120 (1975).

However, trial court is not required to advise defendant, before accepting his guilty plea, of the right to testify on his own behalf. *People v. Malouff*, 721 P.2d 159 (Colo. App. 1986).

And definite, immediate, and automatic consequences of plea. The judge who accepts a plea of guilty is required to inform the defendant only of those consequences which have a definite, immediate and largely automatic effect on the range of a defendant's punishment. *People v. Heinz*, 197 Colo. 102, 589 P.2d 931 (1979).

Where consequence of guilty plea to a crime of moral turpitude subjected defendant to mandatory deportation proceeding, defendant was denied effective assistance of counsel since counsel was unaware of deportation consequence and therefore defendant was entitled to withdraw plea and plead anew. *People v. Pozo*, 712 P.2d 1044 (Colo. App. 1985), rev'd on other grounds, 746 P.2d 523 (Colo. 1987).

A mandatory parole term is such a consequence because parole imposes a significant limitation on a defendant's freedom during the term of parole. *People v. Tyus*, 776 P.2d 1143 (Colo. App. 1989); *People v. Sandoval*, 809 P.2d 1058 (Colo. App. 1990), overruled in *Craig v. People*, 986 P.2d 951 (Colo. 1999).

Trial court, therefore, must advise the defendant of mandatory parole even if a plea agreement contemplates a sentence to probation or community corrections. The only exception is if the parties stipulate to a sentence to probation or to community corrections, the judge explicitly accepts and agrees to be bound by the stipulation, and the judge so advises the defendant. *Dawson v. People*, 30 P.3d 213 (Colo. 2001).

Mandatory sentencing of defendant on parole status under § 18-1-105 is a definite, immediate, and automatic consequence of plea which defendant must understand. *People v. Chipewa*, 713 P.2d 1311 (Colo. App. 1985).

A proper advisement on the subject of mandatory parole requires that a defendant be informed that he or she is subject to a period of mandatory parole, the maximum possible length of that period, and the fact that mandatory parole is a consequence distinct from imprisonment. *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

The proper inquiry is whether the record as a whole demonstrates that a defendant was given sufficient notice of the issue. When a defendant indicates at the providency hearing that he or she understood the matters contained in a written guilty plea advisement form, the burden of proof is on the defendant to show that the apparent waiver was not effective. *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

Failure to properly advise of the term of mandatory parole is harmless if the length of parole and imprisonment together does not exceed the total term of imprisonment to which the defendant was advised. *Craig v. People*, 986 P.2d 951 (Colo. 1999) (overruling *People v. Sandoval*, 809 P.2d 1058 (Colo. App. 1990)).

Thus, it was harmless error where the defendant received an inadequate mandatory advisement but was sentenced to a total sentence of 11 years, plus three years of mandatory parole, when he could have been sentenced to a maximum of 24 years. *Dawson v. People*, 30 P.3d 213 (Colo. 2001).

No script or formula is required so long as the advisement adequately informs defendant of the mandatory parole requirement. *People v. Flagg*, 18 P.3d 792 (Colo. App. 2000).

Where defendant was advised that his sentence would include a term of parole in addition to a stipulated maximum term of incarceration, it is not reasonable to hold that the full range of penalties that the defendant risked receiving is limited to the term of incarceration specified in the plea agreement or the Crim. P. 11 advisement. If defendant was advised of mandatory parole but not its duration, his sentence cannot be modified and the only available remedy under the facts is withdrawal of the guilty plea. *Clark v. People*, 7 P.3d 163 (Colo. 2000).

An agreement that is silent as to parole should not be construed as containing a promise to eliminate or reduce the mandatory period of parole. A plea agreement to reduce or modify the statutorily mandated period of parole calls for an illegal sentence. *Craig v. People*, 986 P.2d 951 (Colo. 1999) (overruling *People v. Sandoval*, 809 P.2d 1058 (Colo. App. 1990)).

Defendant's understanding of the mandatory parole requirement and the lack of indication in the record that the parties' negotiations included the issue of mandatory parole supported trial court's conclusion that the parties' agreement to a "ten year cap" pertained only to the imprisonment component and did not include the five-year mandatory parole period. *People v. Wright*, 53 P.3d 730 (Colo. App. 2002).

A mittimus that does not specify the mandatory parole period should be read as including the appropriate mandatory parole period and must be corrected. *Craig v. People*, 986 P.2d 951 (Colo. 1999) (overruling *People v. Sandoval*, 809 P.2d 1058 (Colo. App. 1990)).

A trial court is not generally required to inform a defendant of the collateral consequences of his guilty plea. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

To satisfy due process, a defendant must be informed only of the direct consequences of his guilty plea, which include those which have a definite, immediate, and largely automatic effect on the range of possible punishment. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Accordingly, a guilty plea is not invalid for failure of a trial court to warn a defendant of its possible effect on future criminal liability. *People v. Heinz*, 589 P.2d 931 (Colo. 1979); *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Although the defendant's sentence to imprisonment and mandatory parole was not inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Defendant cannot be lawfully sentenced for a crime to which he has pled guilty to a term longer than that of which he was advised when it was still within his power to reject the plea. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Case must be remanded to allow defendant the opportunity to affirm or withdraw his guilty plea where the trial court's rejection of the sentence recommendation contained in the plea agreement calls into question the voluntariness of that plea and the defendant had no opportunity to affirm or withdraw that plea. *People v. Walker*, 46 P.3d 495 (Colo. App. 2002).

Case must be remanded to allow defendant to reaffirm or withdraw guilty plea after advisement of the proper sentencing range, including the possibility of sentencing in the aggravated range. Because defendant's plea was not induced by prosecutor's promise, the proper remedy was not to resentence defendant based upon the providency hearing advisement, but to allow defendant to reaffirm or withdraw the plea after advisement of the proper sentencing range. *People v. Corral*, 179 P.3d 837 (Colo. App. 2007).

Possibility that required counseling cannot be completed if the defendant does not admit guilt and that probation may therefore be revoked is a collateral consequence of a guilty plea. Person who entered an Alford plea and could not complete required counseling because of failure to admit guilt could have his or her probation revoked. *People v. Birdsong*, 958 P.2d 1124 (Colo. 1998).

Due process requires compliance only with the mandatory provisions of this rule which inform an accused of the constitutional protection and the critical elements of the charge he faces, and not the factual basis of the plea or the possible defenses to the charge. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

However, the appropriate remedy is not to allow withdrawal of the plea, but reduce the sentence to the maximum that the defendant could receive under the plea agreement. *People v. Sandoval*, 809 P.2d 1058 (Colo. App. 1990).

And waiver of previously raised defenses. Where the defendant previously filed a notice of alibi defense, the trial court, in accepting a later guilty plea, should have assiduously adhered to the requirements of this rule and should have

even made a more detailed inquiry of the defendant to make certain that he was fully aware that by pleading guilty, he was, in effect, making a judicial statement that he was guilty of the offense charged and that his alibi defense was in fact baseless. *People v. Sandoval*, 188 Colo. 431, 535 P.2d 1120 (1975), overruled in *Craig v. People*, 986 P.2d 951 (Colo. 1999).

But judge not required to point out available affirmative defenses. Absent from the provisions of section (b) is any requirement that the trial judge in accepting a guilty plea explain to the defendant possible affirmative defenses to the crime charged; the rationale is that such advice is properly the role of counsel. *People v. Gorniak*, 197 Colo. 289, 593 P.2d 349 (1979); *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

And need not be informed of possible future operation of habitual criminal statutes. It is not required that an adult, before he enters an otherwise uncoerced guilty plea, be informed of the operation of the habitual criminal statutes in the event he should in the future be convicted of illegal acts. *People v. District Court*, 191 Colo. 298, 552 P.2d 297 (1976).

Trial court's oversight may be cured. An oversight on the part of the trial court in a providency hearing may be cured if the record, as a whole, discloses evidence of understanding and knowledge. *People v. Moore*, 636 P.2d 1290 (Colo. App. 1981).

The degree of explanation that a court is required to provide a defendant at a providency hearing is dependent upon the nature and complexity of the crime. *People v. Muniz*, 667 P.2d 1377 (Colo. 1983); *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984); *People v. Cabral*, 698 P.2d 234 (Colo. 1985); *People v. District Court, Arapahoe County*, 868 P.2d 400 (Colo. 1994).

And mere reading of a charge may be sufficient if the charge itself is readily understandable to persons of ordinary intelligence. *People v. Muniz*, 667 P.2d 1377 (Colo. 1983); *People v. Cabral*, 698 P.2d 234 (Colo. 1985).

By reading the charges, which were couched in language easily understandable to a person of ordinary intelligence, by briefly explaining the mens rea necessary, and by inquiring into the defendant's understanding of the charges, the trial judge adequately advised the defendant and provided a fully sufficient basis for the court's determination that the pleas were freely, voluntarily, and intelligently given. *People v. District Court, Arapahoe County*, 868 P.2d 400 (Colo. 1994).

Defining "attempt" as conduct constituting a substantial step toward the commission of the crime is sufficient for the purpose of providing a defendant with the necessary understanding of the crime charged. *People v. District*

Court, Arapahoe County, 868 P.2d 400 (Colo. 1994).

A defendant need not be advised of the right to appeal before a guilty plea may be said to be knowingly and voluntarily given. *People v. District Court, Arapahoe County*, 868 P.2d 400 (Colo. 1994).

Court need not advise defendant of the prosecution's burden to prove his guilt beyond a reasonable doubt as long as defendant is advised that the prosecution has the burden of proof. *People v. Wells*, 734 P.2d 655 (Colo. App. 1986).

Guilty plea of defendant who was not aware of possibility of consecutive sentencing when he entered plea is constitutionally deficient. *People v. Peters*, 738 P.2d 395 (Colo. App. 1987).

Defendant adequately advised regarding the special offender sentence enhancer where the sentences defendant received were within the range of sentences he or she was advised of and were on the low end of the range required by the special offender statute. Thus, defendant was not prejudiced by the erroneous advisements, and the fact that they understated the maximum allowable sentence did not undermine the validity of his or her guilty plea. *People v. Zuniga*, 80 P.3d 965 (Colo. App. 2003).

Failure to advise defendant of a mandatory parole obligation did not invalidate his guilty plea since defendant was correctly advised that he could be incarcerated for a term of from six months to four years and defendant's sentence of one year plus one year parole fell below the four-year maximum. *People v. Coleman*, 844 P.2d 1215 (Colo. App. 1992).

To understand the "possible penalty or penalties", the court must advise the defendant of mandatory parole for all class 2 through class 6 felony convictions that involve a sentence of imprisonment. *Young v. People*, 30 P.3d 202 (Colo. 2001).

Record of providency hearing helpful in satisfying rule. A record of a providency hearing demonstrating compliance with this rule should be deemed supportive of the conclusion that the defendant did enter his or her guilty plea voluntarily and understandingly. *People v. Wade*, 708 P.2d 1366 (Colo. 1985).

The proper basis for analyzing the constitutional validity of a guilty plea should include not only the statements made during the providency hearing but also those statements made by both defendant and defendant's attorney in the petition to plead guilty. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

Evidence in record that defendant understood nature and elements of crime. *People v. Marsh*, 183 Colo. 258, 516 P.2d 431 (1973); *People v. Waits*, 695 P.2d 1176 (Colo. App. 1984), *aff'd in part and rev'd in part* on other grounds, 724 P.2d 1329 (Colo. 1986).

Validity of guilty plea should not be based solely on the colloquy during the providency hearing. The proper basis for determining the validity of a guilty plea should include not only the statements made during a providency hearing but also the statements made by the defendant and the defendant's attorney in the petition to plead guilty. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

Upon entry of a guilty plea, suppression issues become moot. *People v. Waits*, 695 P.2d 1176 (Colo. App. 1984), *aff'd in part and rev'd in part* on other grounds, 724 P.2d 1329 (Colo. 1986).

Trial court to determine defendant's capacity to plead, where appropriate. If there is any question, the trial court has the duty to determine the defendant's mental capacity to understand the nature and effect of such a plea before accepting it. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), *rev'd on other grounds*, 355 F.2d 470 (10th Cir. 1966).

Where the trial court was aware of the possible mental infirmities of the defendant, it should have made sure he clearly, voluntarily, and knowingly entered his guilty plea. *People v. Brown*, 187 Colo. 244, 529 P.2d 1338 (1974).

And if a defendant is insane, plea of guilty should be stricken, and the sentence vacated. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968); *Simms v. People*, 175 Colo. 191, 486 P.2d 22 (1971); *Moneyhun v. People*, 175 Colo. 220, 486 P.2d 434 (1971).

As guilty plea not acceptable from legally insane. As a plea of guilty cannot be accepted where the evidence before the judge suggests that the accused may be legally insane, until his sanity is finally determined; if the plea is accepted prior to such a determination, the judgment is potentially void, depending on whether the accused had the capacity to enter a plea. *Martinez v. Tinsley*, 241 F. Supp. 730 (D. Colo. 1965).

Sixteen-year old competent to enter guilty plea. Although a trial court should act with great caution in accepting a guilty plea from a 16-year old, such a defendant is competent. *Bresnahan v. Patterson*, 352 F. Supp. 1180 (D. Colo. 1973).

Although restraints may be one circumstance that affects defendant's decision to plead guilty, the constitutionality of a defendant's restraints at the time of entry of his pleas is not relevant to determine whether he entered the plea voluntarily. *People v. Kyler*, 991 P.2d 810 (Colo. 2000).

When bargain upon which plea based not honored. If plea of guilty results from plea bargaining and bargain is not honored, the judgment must be vacated. *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973).

Effect of invalid plea upon bargain. When an invalid guilty plea is a result of plea bargain-

ing, vacation of the plea results in an abrogation of the bargain, and there is no impediment to the reinstatement of the charges dismissed as a result of the bargain. *People v. Mason*, 176 Colo. 544, 491 P.2d 1383 (1971); *People v. Keenan*, 185 Colo. 317, 524 P.2d 604 (1974).

Plea bargaining per se does not invalidate a guilty plea. *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967); *Lucero v. People*, 164 Colo. 247, 434 P.2d 128 (1967); *Maes v. People*, 164 Colo. 481, 435 P.2d 893 (1968); *Brewer v. People*, 168 Colo. 505, 452 P.2d 370 (1969).

Purpose of subsection (b)(5). Subsection (b)(5) of this rule is specifically designed to insure that a criminal defendant voluntarily pleads to a charge unfettered by promises of a light sentence or of probation, and is in addition to the inquiry concerning coercion or threats. *People v. Golden*, 184 Colo. 311, 520 P.2d 127 (1974).

Subsection (b)(5) applies to representations and promises by defendant's own counsel. *People v. Golden*, 184 Colo. 311, 520 P.2d 127 (1974).

Pleas of guilty induced by threats or promises are not valid. *Normand v. People*, 165 Colo. 509, 440 P.2d 282 (1968).

As such pleas involuntary. A plea of guilty is clearly involuntary if it is induced by threats or by a promise of lenient sentence. *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973).

And involuntary guilty plea violates due process. A guilty plea which is not entered voluntarily and knowingly is obtained in violation of due process guarantees. *People v. Moore*, 636 P.2d 1290 (Colo. App. 1981).

Defendant's burden to set aside plea. Upon postconviction procedures to set aside an involuntary plea, it becomes the burden of the defendant to establish that the plea was entered because of coercion. *Normand v. People*, 165 Colo. 509, 440 P.2d 282 (1968).

With evidence to overcome presumption of valid plea. The burden is upon the defendant to produce sufficient evidence to overcome the presumption of validity and regularity surrounding entry of his plea of guilty. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

And every reasonable presumption against waiver must be indulged. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

Withdrawal of guilty plea generally should not be denied. The withdrawal of a plea of guilty should not be denied in any case where it is the least evident that the ends of justice would be subserved by permitting not guilty to be pleaded in its place. *Burman v. People*, 172 Colo. 247, 472 P.2d 121 (1970).

Denial of motion to withdraw guilty pleas was not an abuse of discretion by the trial court

where the pleas were entered in accordance with due process of law and this rule. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Defendant was properly advised of his right to a jury trial and knowingly and voluntarily waived that right where the record shows that he executed a five-page "Petition to Enter Plea of Guilty", the trial court held a providency hearing and ascertained that the defendant had read and discussed the petition with his attorney and understood the petition, and the petition was signed by the defense attorney who certified that he had fully discussed the matter with the defendant, the attorney considered the defendant to be competent to understand the effect of the guilty plea, and the attorney recommended the court accept the plea. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

Requirement that defendant understand the possible penalty when pleading guilty met where defendant signed a "Petition to Enter Plea of Guilty" that recited the possible years of incarceration in both the presumptive and extraordinary ranges in addition to the possible fines to which the defendant would be subject, the possibility of consecutive sentencing, mandatory sentencing in the aggravated range, the factors precluding grant of probation, and incarceration as a condition of probation, the plea was entered with an express stipulation that defendant receive a three-year sentence, the trial court at the providency hearing advised the defendant of the stipulation and further advised him that, if at the sentencing hearing, the court rejected the stipulation, defendant would be allowed to withdraw the plea, and defendant responded that he understood. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

Denial of motion to withdraw guilty plea was not an abuse of discretion where the court held a fact hearing before denying defendant's motion, the judge had also conducted the advisement, the court found that defendant's plea had been voluntarily entered, and justice would not be subverted by denying defendant's request. *People v. Weed*, 830 P.2d 1095 (Colo. App. 1991).

Valid guilty plea requires that defendant understand the possible penalty or penalties which could be imposed. *People v. Chavez*, 902 P.2d 891 (Colo. App. 1995).

Subsection (b)(4) requires that defendant be advised, prior to the entry of a guilty plea, of the maximum possible sentence to which that plea will subject him or her, including the maximum that may result if the sentences are ordered to be served consecutively. *People v. Peters*, 738 P.2d 395 (Colo. App. 1987); *People v. Phillips*, 964 P.2d 628 (Colo. App. 1998).

Court not required to advise defendant of the possibility of consecutive sentences that might result from crimes not yet committed or sen-

tences or charges not pending. *People v. Phillips*, 964 P.2d 628 (Colo. App. 1998).

Fact that defense counsel may not have advised client of maximum penalty defendant might be sentenced to does not form the basis for vacating a guilty plea where court gave defendant a complete advisement with respect to the possible penalties, including presumptive and aggravated range penalties for each conviction and the difference between concurrent and consecutive sentences. *People v. Chavez*, 902 P.2d 891 (Colo. App. 1995).

And showing of reason for plea change within discretion of court. Whether a showing of "fair and just reason" for a change of plea was made is a matter within the discretion of the trial court, and the Colorado supreme court will intervene only if the court has abused its discretion. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981).

In determining whether defendant received a proper advisement under the rule, the court looks to whether the record as a whole shows defendant received sufficient information as to be fairly placed on notice of the matter in question. *Young v. People*, 30 P.3d 202 (Colo. 2001).

If an advisement indicates an affirmative waiver, the defendant has the burden to prove, by a preponderance of the evidence, the ineffectiveness of his apparent waiver. *Young v. People*, 30 P.3d 202 (Colo. 2001).

Defendant was entitled to a hearing on motion to withdraw guilty plea where court understated minimum sentence that could be imposed and defendant's plea agreement was not in evidence. On remand, defendant must establish that his asserted belief that he would receive a sentence below the minimum sentence stated by the court was objectively reasonable. *People v. Hodge*, 205 P.3d 481 (Colo. App. 2008).

Burden on defendant. The burden of demonstrating a "fair and just reason" for a change of plea rests on the defendant. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981).

If the advisement is infirm, the court determines if it can correct the error. If the error cannot be corrected, the defendant can withdraw his plea. *Young v. People*, 30 P.3d 202 (Colo. 2001).

The trial court is not bound by the plea agreement, and has an independent duty to examine the appropriate sentence prior to issuance of that sentence. On review, the court looks at the maximum statutory exposure recited by the trial court or included in the documentation. *Young v. People*, 30 P.3d 202 (Colo. 2001).

Except when the trial court explicitly states at the providency hearing that it will accept and agree to be bound by the plea agree-

ment, and so advises the defendant. *Young v. People*, 30 P.3d 202 (Colo. 2001).

Who must show that denial would subvert justice. To warrant a change of plea before entry of a sentence, there must be some showing that denial of the request will subvert justice. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981).

Gutierrez distinguished where the defendant acknowledged his own guilt rather than an independent trier of fact that determined defendant's guilt based on sworn trial testimony. *People v. Schneider*, 25 P.3d 755 (Colo. 2001).

Use of statements made in conjunction with withdrawn or rejected guilty plea. A defendant who challenges the voluntariness or reliability of statements made in the course of tendering a guilty plea which is subsequently withdrawn or rejected and is later sought to be used against him at trial for impeachment purposes is entitled to a hearing which provides the safeguards set forth in *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), before those statements may be used against him. *People v. Cole*, 195 Colo. 483, 584 P.2d 71 (1978).

The prosecution has the right to cure a deficient record by offering evidence at a rule 35(c) hearing which establishes that the defendant's plea was constitutionally obtained. *People v. Lesh*, 668 P.2d 1362 (Colo. 1983).

Jurisdictional defects not waived by plea. Jurisdictional defects, such as insufficiency of a charging instrument, are not waived by a plea of nolo contendere. *People v. Roberts*, 668 P.2d 977 (Colo. App. 1983).

Limitation on use of plea accepted in violation of rule. Conviction based on plea accepted in violation of this rule cannot be used in a later proceeding to support the imposition of statutory liabilities. *People v. Heinz*, 197 Colo. 102, 589 P.2d 931 (1979).

Conditional guilty pleas are not authorized in Colorado by statute or court rule. *People v. Neuhaus*, 240 P.3d 391 (Colo. App. 2009).

A plea accepted in violation of this rule may not be used to support a conviction for purposes of the habitual traffic offender statute. *People v. Roybal*, 618 P.2d 1121 (Colo. 1980).

Substantial compliance with subsection (b)(7). District attorney's oral consent to entry of a guilty plea, made on the record at the providency hearing, substantially complies with the requirements of subsection (b)(7). *People v. Mascarenas*, 643 P.2d 786 (Colo. App. 1981).

Evidence that requirements of rules not complied with. *People v. Van Hook*, 36 Colo. App. 226, 539 P.2d 507 (1975).

III. MISDEMEANOR CASES.

More simplified procedures can properly be used for minor offenses than those required

to be followed in receiving a plea of guilty in serious criminal cases. *Cave v. Colo. Dept. of Rev.*, 31 Colo. App. 185, 501 P.2d 479 (1972).

Procedure for plea to misdemeanor or traffic offense. Before accepting a plea of guilty or nolo contendere to a misdemeanor or traffic offense, the trial court must be satisfied that the defendant's decision to acknowledge guilt has been made knowingly and understandingly. *People v. Lesh*, 668 P.2d 1362 (Colo. 1983).

IV. FAILURE OR REFUSAL TO PLEAD.

When court may enter plea. Where a trial court denies a motion to dismiss for failure to rearraign on an amended information because the amendment is not one of substance, when counsel calls the court's attention to the amended information during the course of the trial, the court may follow the provisions of Crim. P. 11(d) and enter a plea of not guilty, allowing the trial to proceed. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

V. DEFENSE OF INSANITY.

Fact that defendant is insane does not conclusively render him incompetent to proceed or enter a plea of guilty. *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), *aff'd in part and rev'd in part*, 817 P.2d 988 (Colo. 1991).

Plea of not guilty by reason of insanity includes a not guilty plea. *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Section (e) is to be liberally construed in favor of defendants. *Martinez v. People*, 179 Colo. 197, 499 P.2d 611 (1972); *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975); *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978).

Common-law bar on pleading and trial of mentally ill. It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense, and he cannot be adjudged to punishment or executed while he is so disordered as to be incapable of stating any reasons that may exist why judgment should not be pronounced or executed. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), *rev'd on other grounds*, 355 F.2d 470 (10th Cir. 1966).

Plea at arraignment or before trial upon good cause showing. Section (e) sets forth in unequivocal terms that the insanity defense must be interposed at the time of arraignment, except when the court, for good cause shown, permits the plea to be interposed prior to trial. *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975).

Determination of good cause in discretion of trial court. Whether good cause is shown to permit a plea of insanity rests within discretion of trial court. *Taylor v. District Court*, 182 Colo. 406, 514 P.2d 309 (1973).

Not disturbed on appeal absent clear abuse. The question of good cause is one addressed to the sound discretion of the trial judge and, absent a clear abuse of discretion, the trial judge's ruling will not be disturbed on appeal. *Martinez v. People*, 179 Colo. 197, 499 P.2d 611 (1972); *Taylor v. District Court*, 182 Colo. 406, 514 P.2d 309 (1973); *Garza v. People*, 200 Colo. 62, 612 P.2d 85 (1980).

Showing required to prove good cause. Good cause in section (e) of this rule is shown when it is demonstrated that fairness and justice are best subserved by permitting the additional plea. *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975).

Good cause in section (e) of this rule is satisfied if the accused establishes that the plea was not entered at the time of arraignment due to mistake, ignorance, or inadvertence. *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975).

Good cause not established. *Garza v. People*, 200 Colo. 62, 612 P.2d 85 (1980).

Abuse of discretion in not allowing insanity plea. *Taylor v. District Court*, 182 Colo. 406, 514 P.2d 309 (1973); *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975).

Right to have jury solve dispute as to sanity. Where there is a disputed question as to the defendant's sanity, he is entitled to have a jury pass on it. *Abad v. People*, 168 Colo. 202, 450 P.2d 327 (1969).

Choice of entering plea is defendant's. The tactical choice of whether to enter a plea of not guilty by reason of insanity by a defendant found "mentally competent" is left to the defendant and his counsel. *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

And court not authorized to enter insanity plea unless defendant requests. Neither section (e) nor § 16-8-103, gives a trial court the authority to enter a plea of not guilty by reason of insanity when it has not been requested by the defendant or his counsel. *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978); *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

Insanity inquiry at any time during trial. If a court, at any of the stages of a trial, has a reasonable doubt whether a defendant is mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), *rev'd on other grounds*, 355 F.2d 470 (10th Cir. 1966).

Otherwise due process is violated. It is fundamental that a proceeding against an insane person in a criminal matter is a violation of his rights under the due process clause of the four-

teenth amendment. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

VL. PLEA BARGAINING.

Law reviews. For article, "Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process", see 66 Den. U. L. Rev. 243 (1989).

Plea agreements, or plea bargainings, are approved. *Dabbs v. People*, 175 Colo. 273, 486 P.2d 1053 (1971); *People v. White*, 182 Colo. 417, 514 P.2d 69 (1973).

But it may not be utilized to subvert truth or as means of forcing plea to an uncommitted crime. *People v. White*, 182 Colo. 417, 514 P.2d 69 (1973).

Plea bargain may not be hidden and must be brought to the surface for scrutiny. *DeLuzio v. People*, 177 Colo. 389, 494 P.2d 589 (1972).

And defense lawyer must first obtain permission and the consent of his client before plea bargaining. *Dabbs v. People*, 175 Colo. 273, 486 P.2d 1053 (1971).

Coercion. Negotiation regarding charges against a loved one does not necessarily render a plea bargain the product of coercion, because such a plea can be voluntary. *People v. Duran*, 179 Colo. 129, 498 P.2d 937 (1972).

Judge not to participate in bargaining. Participation by trial judge in the plea bargaining process must be condemned. *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

Court may involve itself in plea discussions if such involvement merely involves observations regarding the evolving legal posture of the case or inquiries as to whether the parties still wish to consummate the agreement. *People v. Venzor*, 121 P.3d 260 (Colo. App. 2005).

Section (f)(4) makes it clear that a trial judge shall not participate in plea discussions. This prohibition is designed to prevent coercion by the court in shaping a bargain. *People v. Roy*, 109 P.3d 993 (Colo. App. 2004).

When rejecting a plea agreement, a trial court must demonstrate on the record that it has actually exercised its discretion. A court's failure to make such showing is an abuse of discretion. *People v. Copenhaver*, 21 P.3d 413 (Colo. App. 2000).

Court has discretion to reject a plea agreement, separately from the merits, on the basis that the parties tendered it in an untimely fashion. The trial court must provide adequate notice to the parties of the plea bargain cutoff date and must permit an exception to the rule for good cause. If a court rejects a plea for failure to conform to plea deadline, court need not necessarily consider the terms of the plea agreement proffered by the parties. *People v. Jasper*, 17 P.3d 807 (Colo. 2001).

Court is not bound by a recommendation; in its discretion it may refuse to grant the district attorney's sentence concession. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983); *People v. Smith*, 827 P.2d 577 (Colo. App. 1991).

A prosecutor can only make sentence recommendations, not promises, and sentencing determinations remain within the discretion of the trial court regardless of plea agreements between the prosecution and the defense. *People v. Smith*, 827 P.2d 577 (Colo. App. 1991).

Subsection (f)(2)(I) clearly contemplates that a defendant should be permitted to withdraw his guilty plea where the trial court chooses not to follow the prosecutor's sentence recommendation, regardless of whether the prosecution has promised that the court will follow the recommendation. *People v. Wright*, 194 Colo. 448, 573 P.2d 551 (1978); *People v. Smith*, 827 P.2d 577 (Colo. App. 1991).

But court must comply with Rule 32(e). The provision in subsection (b)(5) of this rule and § 16-7-207 (2)(e), that the court will not be bound by representations made to the defendant "unless [the] representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report . . .", does not free the court from complying with Crim. P. 32(e), which states, that if the court decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge must so advise the defendant and call upon the defendant to affirm or withdraw his plea of guilty or nolo contendere. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Although district judges are barred from the plea negotiation process by this rule, once they have given unqualified approval to a plea agreement they, like the parties, become bound by the terms of that agreement. Were courts free to re-examine the wisdom of plea bargains with the benefit of hindsight, the agreements themselves would lack finality, and the benefits that encourage the government and defendants to enter into pleas might prove illusory. *People v. Roy*, 109 P.3d 993 (Colo. App. 2004).

Application of C.R.E. 410, when read in light of this rule and § 16-7-303, requires the exclusion of evidence of statements made by defendant during plea bargaining process only in regard to plea discussions with the attorney for the government. *People v. Rollins*, 759 P.2d 816 (Colo. App. 1988).

Sentence recommendation is a sentence concession whether or not the court approves or concurs. *People v. Wright*, 38 Colo. App.

271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Offers of identical concessions for similarly situated defendants not required. Section 16-7-301 (3) and subsection (f)(3) of this rule do not require that similarly situated defendants must be offered identical concessions. *People v. Lewis*, 671 P.2d 985 (Colo. App. 1983).

District attorneys have the power to refuse to recommend sentence or probation. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Failure to object at time of acceptance of bargain bars later appeal of sentence. Where the trial court repeatedly reminded the defendant of what the sentence would be when it advised him at the time of the acceptance of his plea of guilty, pursuant to this rule, and where at no time did the defendant or his counsel protest the sentence nor raise an objection that the trial court was not properly exercising its discretion in imposing the sentence, the defendant could not, after benefiting from the plea bargain, claim on appeal that he has been unjustly sentenced. *People v. Cunningham*, 200 Colo. 303, 614 P.2d 886 (1980); *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

The proper standard for evaluating whether a prosecution remains bound by its

obligations under a plea agreement is whether a defendant has materially and substantially breached his obligation to perform under the plea agreement. *People v. McCormick*, 859 P.2d 946 (Colo. 1993).

A plea agreement is more than merely a contract between two parties and must be attended by constitutional safeguards to ensure that a defendant receives the performance that he is due. *People v. McCormick*, 856 P.2d 846 (Colo. 1993).

Once the court chose to engage in the bargaining process and agreed to terms, it became obligated to comply with those terms, just as any other party to the agreement. The court's faithful observance of the terms of the bargain was just as vital to the fairness and efficiency of the process as was the prosecutor's compliance. Once the court committed to the plea agreement, it became bound by the terms of the agreement and could not, absent proof of fraud or breach of the plea bargain, set the agreement aside. *People v. Roy*, 109 P.3d 993 (Colo. App. 2004).

Partial performance not enough. A defendant who materially and substantially breaches a plea agreement cannot enforce the agreement, regardless of whether the defendant has partially performed some of his obligations under it. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

Rule 12. Pleadings, Motions Before Trial, Defenses, and Objections

(a) Pleadings and Motions. Pleadings shall consist of the indictment or information or complaint, or summons and complaint, and the pleas of guilty, not guilty, not guilty by reason of insanity, and *nolo contendere*. All other pleas, demurrers, and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information or complaint, or summons and complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceeding. When a motion challenging the constitutionality of the statute upon which the charge is based or asserting lack of jurisdiction is made after the commencement of the trial, the court shall reserve its ruling on that motion until the conclusion of the trial.

(3) Time of Making Motion. The motion shall be made within 21 days following arraignment.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at

the trial of the general issue except as provided in Rule 41. An issue of fact shall be tried by a jury if a jury trial is required by the Constitution or by statute. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) **Effect of Determination.** If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand.

Source: (b)(3) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Pleading and Motions.
- III. Motion Raising Defenses and Objections.
 - A. Defenses and Objections Which May be Raised.
 - B. Defenses and Objections Which Must be Raised.
 - C. Time of Making Motion.
 - D. Hearing.

I. GENERAL CONSIDERATION.

Technical noncompliance with Crim. P. 16 that does not cause prejudice to defendant will not constitute reversible error. *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984).

Applied in *Stapleton v. District Court*, 179 Colo. 187, 499 P.2d 310 (1972); *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975); *People v. Davis*, 194 Colo. 466, 573 P.2d 543 (1978); *People v. Dickinson*, 197 Colo. 338, 592 P.2d 807 (1979); *People v. Velasquez*, 641 P.2d 943 (Colo. 1982); *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

II. PLEADING AND MOTIONS.

Legal effect of present nomenclature for old procedures is the same. Although the granting of motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, and the declarations of a statute unconstitutional have been abolished by Crim. P. 12(a) and Crim. P. 29(a) the legal effect of the present nomenclature for those procedures is the same, that is, a ruling adverse to the state effectively terminates its prosecution of the defendant and results in a "final judgment". *People v. Cochran*, 176 Colo. 364, 490 P.2d 684 (1971).

III. MOTION RAISING DEFENSES AND OBJECTIONS.

- A. Defenses and Objections Which May Be Raised.

Motion to suppress a lineup identification

is within the scope of this subsection (b)(1). *People v. Renfrow*, 172 Colo. 399, 473 P.2d 957 (1970).

- B. Defenses and Objections Which Must Be Raised.

Waiver of defenses and objections by failure to raise. Failure to raise defenses and objections referred to in subsection (b)(2) by motion constitutes waiver of the defenses and objections. *Mora v. People*, 172 Colo. 261, 472 P.2d 142 (1970).

Motions not within scope of subsection (b)(2). A motion for the return of property and to suppress evidence is not a defense or objection based on defects in the institution of the prosecution or in the indictment, information, or complaint, and, thus, does not fall within the scope of subsection (b)(2). *Adargo v. People*, 173 Colo. 323, 478 P.2d 308 (1970).

A motion to suppress is not a "defense or objection" based on defects listed in this section. *People v. Robertson*, 40 Colo. App. 386, 577 P.2d 314 (1978).

Trial court should entertain motion to dismiss for lack of jurisdiction at whatever stage of the proceedings the question is raised. *Maddox v. People*, 178 Colo. 366, 497 P.2d 1263 (1972).

Absence of verification on information is not jurisdictional. *Quintana v. People*, 168 Colo. 308, 451 P.2d 286 (1969).

Rather, it is for benefit of defendant and is waived unless timely objection is made thereto. *Quintana v. People*, 168 Colo. 308, 451 P.2d 286 (1969); *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900); *Curl v. People*, 53 Colo. 578, 127 P. 951 (1912); *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951); *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957); *Mora v. People*, 172 Colo. 261, 472 P.2d 142 (1970); *Workman v. People*, 174 Colo. 194, 483 P.2d 213 (1971); *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971); *Scott v. People*, 176 Colo. 289, 490 P.2d 1295 (1971).

- C. Time of Making Motion.

Defects raisable in motion in arrest of judgment or for new trial. When objections to

the want of a verifying affidavit and to the competency and credibility of the affiant are raised by the defendant for the first time in a motion in arrest of judgment or in the alternative for a new trial, and the record does not reveal that any objections were raised prior to that time, although the opportunity existed, then the objections come too late. *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

Insufficiency of indictment assertable on appeal. Although defendant did not raise the insufficiency of the indictment at trial or in his motion for new trial, he is not thereby precluded from asserting that defect on appeal. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

Selective prosecution claim must be raised prior to trial. A selective prosecution claim is an objection based upon a defect in the institution of the prosecution, and, therefore, a defendant's failure to raise the objection in a timely motion constitutes a waiver of the objection. *People v. Gallegos*, 226 P.3d 1112 (Colo. App. 2009).

Motion made after trial but before sentencing. A motion challenging the constitutionality of a statute preserves the issue on appeal where the motion is made after oral argument on motion for judgment of acquittal or for new trial, but before sentencing. *People v. Cagle*, 751 P.2d 614 (Colo. 1988).

A substantive defect in an information may be raised at any time during the proceedings. *People v. Williams*, 961 P.2d 533 (Colo. App. 1997), *aff'd in part and rev'd in part* on other grounds, 984 P.2d 56 (Colo. 1999).

Exceptions to duplicitous count must be made before trial. A duplicitous count in a criminal information is only a matter of form, and exceptions which go merely to form must be made before trial. *Russell v. People*, 155

Colo. 422, 395 P.2d 16 (1964); *Specht v. People*, 156 Colo. 12, 396 P.2d 838 (1964).

Compulsory joinder defense not waived. Where compulsory joinder defense was not available when prosecution of felony charge was instituted because second charge had not been filed, defendant did not waive compulsory joinder claim when he failed to raise issue within twenty days after his arraignment on felony charge and, therefore, claim was not based on a defect in institution of prosecution and, thus, this rule did not prevent defendant from moving to dismiss. *People v. Rogers*, 742 P.2d 912 (Colo. 1987).

Waiver of objection to legality of arrest. A defendant who fails to object to his arrest before trial waives his right to challenge the legality of his arrest. *Massey v. People*, 179 Colo. 167, 498 P.2d 953 (1972); *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984).

Admissibility of alibi evidence. While a showing by a defendant of good cause for non-compliance with this rule is a proper factor to be considered by a trial court in deciding whether alibi evidence should be admitted, justification for noncompliance is not the sole determinant of admissibility. *People v. Moore*, 36 Colo. App. 328, 539 P.2d 489 (1975).

The critical consideration for admissibility of alibi evidence is whether the proffered alibi evidence should be admitted in order to assure the defendant a fair trial. *People v. Moore*, 36 Colo. App. 328, 539 P.2d 489 (1975).

D. Hearing.

Defendant's burden on motion to dismiss for want of due prosecution. A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused; he has the burden of showing that he was not afforded a speedy trial. *Jordan v. People*, 155 Colo. 224, 393 P.2d 745 (1964).

Rule 12.1. Notice of Alibi

Repealed March 15, 1985, effective July 1, 1985.

Cross references: For present provisions on notice of alibi, see Crim. P. 16 part II(d).

Rule 13. Trial Together of Indictments, Informations, Complaints, Summons and Complaints

Subject to the provisions of Rule 14, the court may order two or more indictments, informations, complaints, or summons and complaints to be tried together if the offenses, and the defendants, if there are more than one, could have been joined in a single indictment, information, complaint, or summons and complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, complaint, or summons and complaint.

ANNOTATION

Law dependent on facts of each case. The law relating to joinder and severance, and that which permits consolidation of charges, depends on the facts in each particular case. *Hunter v. District Court*, 193 Colo. 308, 565 P.2d 942 (1977).

Evidence sufficient to justify consolidation of informations. *Brown v. District Court*, 197 Colo. 219, 591 P.2d 99 (1979).

When defendant uses a common scheme to commit highly similar crimes, consolidation is not an abuse of discretion. *People v. Gross*, 39 P.3d 1279 (Colo. App. 2001); *People v. Gregg*, __ P.3d __ (Colo. App. 2011).

Sexual assault offenses may be joined if the evidence of each offense would be admissible in separate trials. *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

Joint trial of defendants permitted. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973).

Joinder of unrelated charges allowed for trial on sanity issue. Joinder of a charge of forcible rape with an unrelated deviate sexual intercourse charge committed on a different female on a different date for purposes of trial on the sanity issue was not error. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Applied in *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974); *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979); *Jeffrey v. District Court*, 626 P.2d 631 (Colo. App. 1981); *Gimmy v. People*, 645 P.2d 262 (Colo. 1982); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in any indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. However, upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible. In ruling on a motion by a defendant for severance, the court may order the prosecuting attorney to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

ANNOTATION

Duty of trial judge. The trial judge has a duty to safeguard the rights of the accused and to ensure the fair conduct of the trial, and, in furtherance of that duty, he has broad discretion to order a separate trial of counts when their joinder would result in prejudice. *People v. Fullerton*, 186 Colo. 97, 525 P.2d 1166 (1974).

Consolidation of trials, when the defendant uses a common scheme to commit highly similar crimes, is not an abuse of discretion. *People v. Gross*, 39 P.3d 1279 (Colo. App. 2001).

Purpose of severance is to promote a fair determination of guilt or innocence of one or more defendants. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

Matter of election is within the sound discretion of trial court. *People v. Mayfield*, 184 Colo. 399, 520 P.2d 748 (1974).

And motion for separate trial is addressed to sound discretion of trial court. *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973); *Ruark v. People*, 158 Colo. 287, 406 P.2d 91

(1965); *Small v. People*, 173 Colo. 304, 479 P.2d 386 (1970); *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972); *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973); *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973); *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975); *People v. Martinez*, 190 Colo. 507, 549 P.2d 758 (1976); *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976); *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Wortham*, 690 P.2d 876 (Colo. App. 1984).

A motion for severance is directed to the sound discretion of the trial court, and, absent an abuse of that discretion resulting in prejudice to the moving defendant, denial of the motion will not be disturbed on appeal. *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Allen*, 42 Colo. App. 345, 599 P.2d 264 (1979); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Martinez*, 652 P.2d 174 (Colo. App. 1981); *People v. Early*, 692 P.2d 1116 (Colo. App. 1984); *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

And what constitutes abuse of discretion depends upon facts of each particular case. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973); *Hunter v. District Court*, 193 Colo. 308, 565 P.2d 942 (1977).

To show abuse of discretion with respect to the denial of a motion to sever counts, a defendant must demonstrate that joinder caused actual prejudice and that trier of fact was unable to separate the facts and legal principles applicable to each offense. *People v. Knight*, 167 P.3d 141 (Colo. App. 2006); *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

And court granted discretion in determining prejudicial circumstances. Although this rule specifies one situation in which separate trials of joint defendants are mandatory, it leaves to the trial court's discretion the determination of what circumstances may prejudice a sole defendant if multiple counts against him are joined in a single trial. *People v. Gallagher*, 194 Colo. 121, 570 P.2d 236 (1977).

There must be actual prejudice to the defendant and not just differences that are inherent in any trial of different offenses. *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977); *People v. Early*, 692 P.2d 1116 (Colo. App. 1984); *People v. Guffie*, 749 P.2d 976 (Colo. App. 1987).

Joinder requiring disclosure of prior conviction denies fair trial. Joinder of counts, one of which requires the disclosure of the defendant's prior conviction to the jury panel at the inception of a case, so taints the trial with the defendant's prior criminality that a fair trial on the other counts is impossible. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

And unfairness to deny defendant favorable inferences of codefendant's silence. There is a distinct element of unfairness, albeit not always prejudicial, in denying one codefendant any favorable inference to be drawn from the other's silence, for it prohibits him from urging upon the jury every point favorable to his case. *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978).

When denial of severance disturbed on appeal. Absent an abuse of discretion resulting in prejudice to the moving defendant, a denial of a motion for severance will not be disturbed on appeal. *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973).

And inartfully raised motion to sever is sufficient to preserve issue for appeal. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

Factors to be considered on motion for severance. Motion for severance will be granted when grounded on the presence of four factors: (1) The defenses of the defendants were antagonistic; (2) one defendant took the stand and his attorney could not comment on the other defendant's silence; (3) one defendant, if tried first, could conceivably testify on behalf of

the other at the later trial; (4) the evidence was largely circumstantial and stronger against one defendant. *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973).

Necessity of severance is tested by the standard that it must be "deemed appropriate to promote a fair determination of the guilt or innocence of a defendant", and that standard, in turn, is tested by the following: (1) Whether the number of defendants or the complexity of the evidence is such that the jury will probably confuse the evidence and law applicable to each defendant; (2) whether evidence inadmissible against one defendant will be considered against the other defendant despite admonitory instructions; (3) whether there are antagonistic defenses. *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978).

When deciding whether to grant a motion for severance, the trial court should consider whether evidence inadmissible against one defendant will be considered against the other defendant, despite the issuance by the trial court of the proper admonitory instructions. An additional consideration is whether the defendants plan to offer antagonistic defenses. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979).

Important inquiry is whether the trier of fact will be able to separate the facts and legal theories applicable to each offense. *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Joinder of offenses permissible to show common elements. Joinder of sexual assault offenses is permissible where the evidence tending to prove each offense would be admissible in separate trials to show common plan, scheme, design, identity, modus operandi, motive, guilty knowledge, or intent. *People v. Allen*, 42 Colo. App. 345, 599 P.2d 264 (1979).

Desire to testify on one count does not entitle defendant to separate trial. The mere fact that defendant wishes to testify on one count and not on the other does not automatically entitle one to severance. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975); *People v. Early*, 692 P.2d 1116 (Colo. App. 1984).

And fact of antagonistic defenses may not always demand severance, but certainly it justifies separate trials in many instances. *Eder v. People*, 179 Colo. 122, 498 P.2d 945 (1972).

When separate trial not required. Where references to a defendant are carefully and completely deleted from a codefendant's written statement which also implicates the defendant and the jury is instructed that such written statement is to be considered solely for the purpose of determining the guilt or innocence of the codefendant, then, in a separate trial of the defendant as an accessory, the questioned statement, under such a limiting instruction, would

be admissible on the issue of the guilt of the codefendant, and, accordingly, this rule, by its very terms, does not require a separate trial. *Stewart v. People*, 161 Colo. 1, 419 P.2d 650, 26 A.L.R.3d 943 (1966).

Bifurcated trial before single jury did not result in defendant being denied his right to a fair trial on previous offender charges or abuse of court's discretion in denying motion for separate trials before different juries. *People v. Robinson*, 187 P.3d 1166 (Colo. App. 2008).

When separate trial to be granted as of right. Upon motion, any defendant must be granted a separate trial as of right if the court finds that the prosecution probably will present, against a joint defendant, evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant. *Ruark v. People*, 158 Colo. 287, 406 P.2d 91 (1965); *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972); *People v. Horne*, 619 P.2d 53 (Colo. 1980).

Severance not mandatory where one codefendant testifies while other does not. The fact that one codefendant testifies while the other does not, does not mandate severance. *People v. Toomer*, 43 Colo. App. 182, 604 P.2d 1180 (1979).

But if defendant fails to move for severance, he cannot raise question on appeal. *Pineda v. People*, 152 Colo. 545, 383 P.2d 793 (1963); *Reed v. People*, 174 Colo. 43, 482 P.2d 110 (1971); *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

Failure to renew pretrial motion to sever waives right to challenge trial court's denial on appeal. *People v. Aalbu*, 696 P.2d 796 (Colo. 1985).

Nor where defendant accedes to limitation on admissibility of evidence. Where the trial court rules that certain evidence is admissible only as to a codefendant and the defendant accedes to this ruling, he waives any further objection. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

And motion need not detail specific objectionable evidence. Where the court has no basis for concluding that the defendant was aware of objectionable testimony relied on in a motion for severance of trials until after the trial commenced, and the defendant rightfully filed his motion before the evidence was presented, it is not necessary for the motion to make reference to the specific evidence being relied upon. *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

But motion for severance must contain evidence which is claimed to be incompetent toward the moving party, so that the court will be given the opportunity to determine whether the one requesting a severance may be prejudiced by testimony admissible against the codefendant, but not admissible as to him. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970); *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

Applied in *People v. Story*, 182 Colo. 122, 511 P.2d 492 (1973); *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974); *People v. Ciari*, 189 Colo. 325, 540 P.2d 1094 (1975); *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977); *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981); *People v. Peterson*, 656 P.2d 1301 (Colo. 1983); *People v. Gregory*, 691 P.2d 357 (Colo. App. 1984).

Rule 15. Depositions

(a) Motion and Order. The prosecutor or the defendant may file a motion supported by an affidavit any time after an indictment, information, complaint, or summons and complaint is filed requesting that the deposition of a prospective witness be taken before the court. The court may order that a deposition be taken before the court if a prospective witness may be unable to attend a trial or hearing and it is necessary to take that person's deposition to prevent injustice. The court shall identify the witness and fix the date and time for the deposition in the order and shall give every party reasonable notice of the time and place for taking the deposition. For good cause shown, the court may reschedule the date and time for the deposition.

(a.5) Deposition by Stipulation Permitted. The prosecution and defense may take a deposition before a judge by stipulation.

(b) Subpoena of Witness. Upon entering an order for the taking of a deposition, the court shall direct that a subpoena issue for each person named in the order and may require that any designated books, papers, documents, photographs, or other tangible objects, not privileged, be produced at the deposition. If it appears, however, that the witness will disregard a subpoena, the court may direct the sheriff to produce the prospective witness in court where the witness may be released upon personal recognizance or upon reasonable bail conditioned upon the witness's appearance at the time and place fixed for the taking of deposition. If the witness fails to give bail, the court shall remand him to custody until the

deposition can be taken but in no event for longer than forty-eight hours. If the deposition be not taken within forty-eight hours, the witness shall be discharged.

(c) **Presence of Defendant.** The defendant shall be present at the deposition unless the defendant voluntarily fails to appear after receiving notice of the date, time, and place of the deposition.

(d) **Taking and Preserving Depositions.** Depositions shall be taken and transcribed as the court may direct and upon completion shall be lodged with the clerk of the court.

(e) **Use.** At the trial, or at any hearing, a part or all of a deposition may be used, so far as otherwise allowed by law or by stipulation.

(f) **Copies of Deposition to Defendant.** If the deposition is taken at the instance of the prosecution, a transcribed copy of it shall be furnished without cost to the defendant promptly upon the defendant's request.

Source: Entire rule amended and adopted May 25, 2006, effective July 1, 2006.

Cross references: For depositions in specific circumstances, see § 18-6.5-103.5 (victims or witnesses who are at-risk adults), § 18-6-401.3 (victims of child abuse), and § 18-3-413 (children who are victims of sexual offenses), C.R.S.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

This rule limits taking of depositions in a criminal proceeding to those situations where the prospective witness "may be unable to attend a trial or hearing". *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

Primary purpose of subdivision (e) is to safeguard the confrontation rights of the criminally accused by limiting the use of deposition testimony to narrowly defined situations of unavailability. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Trial court has great discretion in determining whether to allow the taking of deposition testimony under this rule. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

A Colorado court does not have authority under this rule to order a deposition of a person outside of its jurisdiction. Trial court was in error in granting a motion to depose a witness residing in Mexico. The rule specifically provides that the deposition must be taken in the court's presence. It also logically follows that, since the rule requires the court to subpoena the witness who is to be deposed, the court may not order a deposition of any person who may not be legally served a subpoena. The provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which extends a court's jurisdiction to persons in other states, applies only within the United States and only to other states that have enacted the same law. Thus, in ordering the deposition of a person in Mexico, the district court was proceeding without jurisdiction. *People v. Arellano-Avila*, 20 P.3d 1191 (Colo. 2001).

This rule does not allow taking of depositions for purely discovery purposes, be it in-state or out-of-state. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

"Unavailability" determined at time of trial. Unavailability within the context of subdivision (e) is to be determined at the time of trial in light of the circumstances then existing. The mere granting of a pretrial motion to depose a witness accords no presumption of unavailability at the time of trial. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983); *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

Showing required before deposition admitted. Before a deposition is admitted into evidence, the proponent of the deposition must make some showing, by evidence or stipulation, that the witness's inability to testify at trial is due to sickness or infirmity. Mere inconvenience or passing discomfort does not satisfy the unambiguous provisions of the rule. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Affidavit not essential to motion. The purpose of the affidavit requirement in section (a) is to ensure that the court has sufficient information to decide the merits of the motion, i.e., whether a witness might be unable to attend the trial. Where the court is thoroughly informed of the facts supporting the motion by other means, and defendant does not dispute these assertions, the lack of an affidavit is not fatal. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

Lack of finding of unavailability may not constitute deprivation of rights. Where prosecution uses depositions of witnesses at trial, and the defendant was present with counsel and granted full rights of cross-examination at the time of the taking of the depositions before a

judge, the defendant is not deprived of his right to confront the witnesses at the trial where the depositions are used without a finding of unavailability of the deponents when it is a matter

of his counsel's trial strategy. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

Applied in *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Rule 16. Discovery and Procedure Before Trial

Definitions.

(1) "Defense", as used in this rule, means an attorney for the defendant, or a defendant if pro se.

Part I. Disclosure to the Defense

(a) Prosecutor's Obligations.

(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:

(I) Police, arrest and crime or offense reports, including statements of all witnesses;

(II) With consent of the judge supervising the grand jury, all transcripts of grand jury testimony and all tangible evidence presented to the grand jury in connection with the case;

(III) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(IV) Any books, papers, documents, photographs or tangible objects held as evidence in connection with the case;

(V) Any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;

(VI) All tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case;

(VII) A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;

(VIII) Any written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one.

(2) The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.

(b) Prosecutor's Performance of Obligations.

(1) The prosecuting attorney shall perform his or her obligations under subsections (a)(1)(I), (IV), (VII), and with regard to written or recorded statements of the accused or a codefendant under (VIII) as soon as practicable but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges, except that portions of such reports claimed to be nondiscoverable may be withheld pending a determination and ruling of the court under Part III but the defense must be notified in writing that information has not been disclosed.

(2) The prosecuting attorney shall request court consent and provide the defense with all grand jury transcripts made in connection with the case as soon as practicable but not later than 35 days after indictment.

(3) The prosecuting attorney shall perform all other obligations under subsection (a)(1) as soon as practicable but not later than 35 days before trial.

(4) The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within

his or her possession or control all material and information relevant to the accused and the offense charged.

(c) Material Held by Other Governmental Personnel.

(1) Upon the defense's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense.

(2) The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

(d) Discretionary Disclosures.

(1) The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing by the defense that the request is reasonable.

(2) The court may deny disclosure authorized by this section if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense.

(3) Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705.

(e) Matters not Subject to Disclosure.

(1) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

(2) **Informants.** Disclosure shall not be required of an informant's identity where his or her identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

Part II. Disclosure to Prosecution

(a) The Person of the Accused.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon request of the prosecuting attorney, the court may require the accused to give any nontestimonial identification as provided in Rule 41.1(h)(2).

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provision may be made for appearance for such purposes in an order admitting the accused to bail or providing for his or her release.

(b) Medical and Scientific Reports.

(1) Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(2) Subject to constitutional limitations, and where the interests of justice would be served, the court may order the defense to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this

rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. The intent of this section is to allow the prosecution sufficient meaningful information to conduct effective cross-examination under CRE 705.

(c) Nature of Defense.

Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial. The defense shall also disclose the names and addresses of persons whom the defense intends to call as witnesses at trial. At the entry of the not guilty plea, the court shall set a deadline for such disclosure. In no case shall such disclosure be less than 35 days before trial for a felony trial, or 7 days before trial for a non-felony trial, except for good cause shown. Upon receipt of the information required by this subsection (c), the prosecuting attorney shall notify the defense of any additional witnesses which the prosecution intends to call to rebut such defense within a reasonable time after their identity becomes known.

(d) Notice of Alibi.

The defense, if it intends to introduce evidence that the defendant was at a place other than the location of the offense, shall serve upon the prosecuting attorney as soon as practicable but not later than 35 days before trial a statement in writing specifying the place where he or she claims to have been and the names and addresses of the witnesses he or she will call to support the defense of alibi. Upon receiving this statement, the prosecuting attorney shall advise the defense of the names and addresses of any additional witnesses who may be called to refute such alibi as soon as practicable after their names become known. Neither the prosecuting attorney nor the defense shall be permitted at the trial to introduce evidence inconsistent with the specification, unless the court for good cause and upon just terms permits the specification to be amended. If the defense fails to make the specification required by this section, the court shall exclude evidence in his behalf that he or she was at a place other than that specified by the prosecuting attorney unless the court is satisfied upon good cause shown that such evidence should be admitted.

Part III. Regulation of Discovery

(a) Investigation Not to be Impeded.

Subject to the provisions of Parts I (d) and III (d), neither the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case or with showing any relevant material to any party, counsel or their agent, nor shall they otherwise impede counsel's investigation of the case. The court shall determine that the parties are aware of the provision.

(b) Continuing Duty to Disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, including the names and addresses of any additional witnesses who have become known or the materiality of whose testimony has become known to the district attorney after making available the written list required in part I (a)(1)(VII), he or she shall promptly notify the other party or his or her counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(c) Custody of Materials.

Materials furnished in discovery pursuant to this rule may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for purposes of preparation and trial of the case, and shall be subject to such other terms, conditions or restrictions as the court, statutes or rules may provide. Defense counsel is not required to provide actual copies of discovery to his or her client if defense counsel reasonably believes that it would not be in the client's interest, and other methods of having the client review discovery are available. An attorney may also use materials he or she receives in discovery for the purposes of educational presentations if all identifying information is first removed.

(d) Protective Orders.

With regard to all matters of discovery under this rule, upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party to make beneficial use thereof.

(e) Excision.

(1) When some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the nondiscoverable material may be excised and the remainder made available in accordance with the applicable provisions of these rules.

(2) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(f) In Camera Proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(g) Failure to Comply; Sanctions.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

Part IV. Procedure

(a) General Procedural Requirements.

(1) In all criminal cases, in procedures prior to trial, there may be a need for one or more of the following three stages:

(I) An exploratory stage, initiated by the parties and conducted without court supervision to implement discovery required or authorized under this rule;

(II) An omnibus stage, when ordered by the court, supervised by the trial court and court appearance required when necessary;

(III) A trial planning stage, requiring pretrial conferences when necessary.

(2) These stages shall be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

(b) Setting of Omnibus Hearing.

(1) If a plea of not guilty or not guilty by reason of insanity is entered at the time the accused is arraigned, the court may set a time for and hold an omnibus hearing in all felony and misdemeanor cases.

(2) In determining the date for the omnibus hearing, the court shall allow counsel sufficient time:

(I) To initiate and complete discovery required or authorized under this rule;

(II) To conduct further investigation necessary to the defendant's case;

(III) To continue plea discussion.

(3) The hearing shall be no later than 35 days after arraignment.

(c) Omnibus Hearing.

(1) If an omnibus hearing is held, the court on its own initiative, utilizing an appropriate checklist form, should:

(I) Ensure that there has been compliance with the rule regarding obligations of the parties;

(II) Ascertain whether the parties have completed the discovery required in Part I (a), and if not, make orders appropriate to expedite completion;

(III) Ascertain whether there are requests for additional disclosures under Part I (d);

(IV) Make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(V) Ascertain whether there are any procedural or constitutional issues which should be considered; and

(VI) Upon agreement of the parties, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference.

(2) Unless the court otherwise directs, all motions and other requests prior to trial should be reserved for and presented orally or in writing at the omnibus hearing. All issues presented at the omnibus hearing may be raised without prior notice by either party or by the court. If discovery, investigation, preparation, and evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(3) Any pretrial motion, request, or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(4) Stipulations by any party or his or her counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(5) A verbatim record of the omnibus hearing shall be made. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matter determined or pending.

(d) Omnibus Hearing Forms.

(1) The forms set out in the Appendix to Chapter 29 shall be utilized by the court in conducting the omnibus hearing. These forms shall be made available to the parties at the time of the defendant's first appearance.

(2) Nothing in the forms shall be construed to make substantive changes of these rules.

(e) Pretrial Conference.

(1) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of the parties, the trial court may (in addition to the omnibus hearing) hold one or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might be considered include:

(I) Making stipulations as to facts about which there can be no dispute;

(II) Marking for identification various documents and other exhibits of the parties;

(III) Excerpting or highlighting exhibits;

(IV) Waivers of foundation as to such documents;

(V) Issues relating to codefendant statements;

(VI) Severance of defendants or offenses for trial;

(VII) Seating arrangements for defendants and counsel;

(VIII) Conduct of jury examination, including any issues relating to confidentiality of juror locating information;

(IX) Number and use of peremptory challenges;

(X) Procedure on objections where there are multiple counsel or defendants;

(XI) Order of presentation of evidence and arguments when there are multiple counsel or defendants;

(XII) Order of cross-examination where there are multiple defendants;

(XIII) Temporary absence of defense counsel during trial;

(XIV) Resolution of any motions or evidentiary issues in a manner least likely to inconvenience jurors to the extent possible; and

(XV) Submission of items to be included in a juror notebook.

(2) At the conclusion of the pretrial conference, a memorandum of the matters agreed upon should be signed by the parties, approved by the court, and filed. Such memorandum shall be binding upon the parties at trial, on appeal and in postconviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his or her attorney.

(f) Juror Notebooks.

Juror notebooks shall be available during all felony trials and deliberations to aid jurors in the performance of their duties. The parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. In non-felony trials, juror notebooks shall be optional.

Part V. Time Schedules and Discovery Procedures

(a) Mandatory Discovery.

The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) and Part II (b)(1), (c) and (d) herein, is mandatory and no motions for discovery with respect to such items may be filed.

(b) Time Schedule.

(1) In the event the defendant enters a plea of not guilty or not guilty by reason of insanity, or asserts the defense of impaired mental condition, the court shall set a deadline for such disclosure to the prosecuting attorney of those items referred to in Parts II (b) (1) and (c) herein, subject to objections which may be raised by the defense within that period pursuant to Part III (d) of this rule. In no case shall such disclosure be less than 35 days before trial for a felony trial, or 7 days before trial for a non-felony trial, except for good cause shown.

(2) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(3) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) Cost and Location of Discovery.

The cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant. The place of discovery and furnishing of materials shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) Compliance Certificate.

(1) When deemed necessary by the trial court, the prosecuting attorney and the defense shall furnish to the court a compliance certificate signed by all counsel listing specifically each item furnished to the other party. The court may, in its discretion, refuse to admit into evidence items not disclosed to the other party if such evidence was required to be disclosed under Parts I and II of this rule.

(2) If discoverable matters are obtained after the compliance certificate is filed, copies thereof shall be furnished forthwith to the opposing party and, upon application to the court, the court may either permit such evidence to be offered at trial or grant a continuance in its discretion.

Source: Entire rule repealed and readopted March 15, 1985, effective July 1, 1985; Part I IP(a)(1), (a)(1)(I), and (b)(1) and Part V (d)(1) amended September 9, 1985, effective January 1, 1986; Part I (a)(1) and (b)(1) and Part III (b) amended and adopted September 4, 1997, effective January 1, 1998; Part IV (e) amended and Part IV (f) added June 25, 1998, effective January 1, 1999; Part IV (f) corrected, effective January 7, 1999; Part I (a)(1)(VI) corrected, effective March 2, 1999; Part I (a)(1)(I) and (a)(1)(VII), Part II (c), and Part V (a) and (b)(1) amended and Part I (a)(1)(VIII) and (d)(3) and Part II (b)(2) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted May 17, 2001, effective July 1, 2001; entire rule amended and effective January 17, 2008; Part III (c) amended and effective April 6, 2009; Part I (b)(1), (b)(2), and (b)(3), Part II (c) and (d), Part IV (b)(3), and Part V (b)(1) amended and adopted December 14, 2011, effective July 1, 2012.

Cross references: For a limitation on the disclosure of names and addresses of witnesses, see § 16-5-203, C.R.S.

ANNOTATION

- I. General Consideration.
- II. Disclosure to Defendant.
- III. Disclosure to Prosecution.
- IV. Regulation.
- V. Procedure.

I. GENERAL CONSIDERATION.

Law reviews. For case note, "A Proposed Rule of Criminal Pretrial Discovery", see 49 U. Colo. L. Rev. 443 (1978). For article, "Attacking the Seizure — Over-coming Good Faith", see 11 Colo. Law. 2395 (1982). For article, "Governmental Loss or Destruction of Exculpatory Evidence: A Due Process Violation", see 12 Colo. Law. 77 (1983). For article, "Discovery and Admissibility of Police Internal Investigation Reports", see 12 Colo. Law. 1745 (1983). For comment, "'Twenty Questions' Doesn't Yield Due Process: Chaney v. Brown and the Continued Need to Open Prosecutor's Files in Criminal Proceeding", see 62 Den. U. L. Rev. 193 (1985). For comment, "Limiting Prosecutorial Discovery Under the Sixth Amendment Right to Effective Assistance of Counsel: Hutchinson v. People", see 66 Den. U. L. Rev. 123 (1988).

Trial court must rule on motion for disclosure of the names of confidential informants. A trial court cannot delay ruling on a defendant's motion for disclosure of the names of confidential informants, notwithstanding the agreement of the parties, on the theory that the motion would be moot if the court were to deny defendant's motion to suppress evidence because reasonable suspicion justified an investigatory stop even absent the information obtained from the confidential informants. The court must rule on the disclosure motion so that the basis for the investigatory detention can be considered in light of the totality of the circumstances. *People v. Saint-Veltri*, 945 P.2d 1339 (Colo. 1997).

Right to pretrial discovery was nonexistent under the common law. *People ex rel. Shinn v. District Court*, 172 Colo. 23, 469 P.2d 732 (1970); *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972); *Sergeant v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

Trial court's authority to grant discovery is limited to the categories expressly set forth in this rule. *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981).

Scope of discovery prior to preliminary hearing is specifically limited by this rule. *People v. Kingsley*, 187 Colo. 258, 530 P.2d 501 (1975).

Categories of discoverable material do not include compelled physical examination of child victim of sexual abuse. *People v. Chard*, 808 P.2d 351 (Colo. 1991); *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003), *aff'd* on other grounds, 102 P.3d 315 (Colo. 2004).

But rule is not designed to convert preliminary hearing into a mini trial. *People v. Kingsley*, 187 Colo. 258, 530 P.2d 501 (1975).

Defendant and prosecution granted independent rights. This rule is not conditional, but rather grants independent discovery rights to both the prosecution and the defendant. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975).

Exemption from discovery under the attorney work-product doctrine is intended to ensure the privacy of a party's attorney from unnecessary intrusion by opposing parties and counsel, but this privilege is not absolute; it is not personal to the client, and it can be waived by an attorney's course of conduct. *People v. Small*, 631 P.2d 148 (Colo. 1981).

The decision of whether to order disclosure is committed to the sound discretion of the trial court, and the court's exercise of that discretion is entitled to strong deference. *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

Technical non-compliance with rule does not constitute reversible error, and evidence is generally not improperly withheld if the defense has knowledge of it. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), *cert denied*, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986).

Although prosecution violated this rule by the untimely disclosure of expert's report to defendant, it did not necessarily follow that the trial court's denial of defendant's motion for a continuance was reversible error, since failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

The work product doctrine, although most frequently asserted as a bar to discovery in civil litigation, applies with equal, if not greater, force in criminal prosecutions. *People v. District Court*, 790 P.2d 332 (Colo. 1990); *People v. Ullery*, 964 P.2d 539 (Colo. App. 1997), *aff'd* in part and *rev'd* in part on other grounds, 984 P.2d 586 (Colo. 1999).

Witness statements in prosecutor's notes and work sheets of the prosecuting attorney or members of the prosecutor's staff are ordinarily considered non-discoverable work product be-

cause they are prepared for litigation. *People v. District Court*, 790 P.2d 332 (Colo. 1990).

Report of an interview of a witness by a lay investigator is not prosecutor's work product and, hence, is automatically discoverable under subsection (I)(a)(1)(I). *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

Section 19-1-307 (2) does not provide equal access to social services records in a criminal case, and it changes the automatic disclosure process contemplated by subsection (I)(a)(1) of this rule. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) limits defendant's access to items that the court, after an in camera review, determines necessary for the resolution of an issue. Therefore, defendant cannot expect automatic disclosure of records within the possession and control of prosecuting attorney. Instead, defendant must request an in camera review, identify the information sought, and explain why disclosure is necessary for resolution of an issue. To achieve the broadest possible disclosure, defendant should explain the relevance and materiality of the information sought. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

Prosecutor has full access to records while investigating a report of known or suspected incident of child abuse or neglect. Section 19-1-307 (2)(f) does not suspend prosecutor's obligation to disclose information that is materially favorable to defendant, but it does change it. The duty to disclose is subject to the in camera review process in § 19-1-307 (2)(f). Therefore, if the prosecutor believes a social services record contains information it must disclose, the prosecutor must ask the trial court to conduct an in camera review of the information to determine if disclosure is necessary for the resolution of an issue. If the trial court determines the information is necessary, then it is disclosed to the defendant. The prosecutor does not have the right to offer the material into evidence without first obtaining the trial court's approval. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) places the trial court in the middle of a procedural issue that normally would have been handled by counsel through the automatic disclosure requirements under subsection (I)(a)(1) of this rule. The trial court must review the records to determine whether the records are necessary for the resolution of an issue. Although the determination of whether the records should be disclosed must be made on case-specific circumstances, there are three principles that apply generally. First, under due process considerations, the trial court must disclose any information that is materially favorable to defendant because it is either exculpatory or impeaching. Second, the trial court should disclose inculpatory information when

the information would materially assist in preparing the defense. Finally, it may be significant, although not determinative, that the information would be otherwise subject to automatic disclosure under subsection (I)(a)(1) of this rule. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

For history of this rule, see *People v. Adams County Court*, 767 P.2d 802 (Colo. App. 1988).

Applied in *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967); *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972); *People v. Smith*, 179 Colo. 413, 500 P.2d 1177 (1972); *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974); *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974); *People v. Steed*, 189 Colo. 212, 540 P.2d 323 (1975); *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976); *People v. Henderson*, 38 Colo. App. 308, 559 P.2d 1108 (1976); *People v. Bloom*, 195 Colo. 246, 577 P.2d 288 (1978); *Goodwin v. District Court*, 196 Colo. 246, 588 P.2d 874 (1979); *People v. Davenport*, 43 Colo. App. 41, 602 P.2d 871 (1979); *People v. Schlegel*, 622 P.2d 98 (Colo. App. 1980); *People v. Callis*, 666 P.2d 1100 (Colo. App. 1982), *aff'd* in part and *rev'd* in part, 692 P.2d 1045 (Colo. 1984); *Denbow v. Williams*, 672 P.2d 1011 (Colo. 1983); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985); *People v. Madsen*, 743 P.2d 437 (Colo. App. 1987).

II. DISCLOSURE TO DEFENDANT.

Remedial purpose of automatic disclosure requirement in subsection (I)(a)(1) is broader than merely to ensure disclosure of evidence known to prosecution but unknown to defense. Disclosure of evidence within scope of rule is required whether or not material to the case, whether or not requested by defense, and whether or not it pertains to witnesses endorsed by the defense or who would be called by prosecution only for rebuttal purposes. Rule is designed to avoid loss of defendants' rights through inadvertent failure to make timely requests and to minimize court's supervisory role in basic discovery process, and to this end disclosure must be automatic unless prosecution takes specified action. *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

Written notification expressly required if prosecutor deems material not discoverable. *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

This rule governs the obligation of the prosecutor to cooperate with the defendant in the securing of evidence. Thus the prosecutor is obligated to give the names and addresses of witnesses as well as reports, statements, etc., of experts it intends to use. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

Duty of prosecution and courts to disclose evidence favorable to defendant. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. *Cheatwood v. People*, 164 Colo. 334, 435 P.2d 402 (1967); *People v. Millitello*, 705 P.2d 514 (Colo. 1985); *People v. Terry*, 720 P.2d 125 (Colo. 1986).

The prosecution is obligated to disclose to the defendant evidence favorable to the accused. *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

This rule does not conflict with § 18-6-403 (3)(b). Therefore the prosecution was required to provide the defense an opportunity to examine photographs under the same conditions as the prosecution. *People v. Arapahoe County Court*, 74 P.3d 429 (Colo. App. 2003).

Scope of discovery includes names, photographs, and statements. Where the defense seeks discovery, the defense should be given access to the names of those whose prints have been compared, photographs of the crime scene, and statements which the defendant has made prior to the time he testifies at trial. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

This rule clearly grants defense counsel the right to obtain names of witnesses and any statements which they might have given prior to the preliminary hearing. *People v. Kingsley*, 187 Colo. 258, 530 P.2d 501 (1975).

This rule requires that every statement made by the accused which is in the possession or control of the district attorney and which relates in any way to the series of events from which the charges pending against the accused arose must be disclosed to the defense upon an appropriate motion. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

And appropriate portions of grand jury minutes. A prosecuting attorney shall disclose to defense counsel those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. *Parlapiano v. District Court*, 176 Colo. 521, 491 P.2d 965 (1971).

This rule permits discovery of grand jury testimony of a party. *Robles v. People*, 178 Colo. 181, 496 P.2d 1003 (1972).

Even where trial is upon a direct information. Examination of the grand jury testimony of a witness testifying at the trial is to be permitted whether the trial is upon an indictment or upon a direct information when the grand jury has not returned any indictment. *Norman v. People*, 178 Colo. 190, 496 P.2d 1029 (1972).

Disclosure not dependent on showing of particularized need. A disclosure of grand jury testimony should be granted without a showing of a particularized need. *Parlapiano v. District*

Court, 176 Colo. 521, 491 P.2d 965 (1971); *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

Although automatic disclosure of grand jury testimony not required. The liberal discovery rights which have been granted to a defendant in this state do not guarantee automatic access to everything that transpires before the grand jury. *Parlapiano v. District Court*, 176 Colo. 521, 491 P.2d 965 (1971); *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980).

Refusal to allow examination of grand jury testimony held not error. *Robles v. People*, 178 Colo. 181, 496 P.2d 1003 (1972).

Generally, defendant has no constitutional right to compel disclosure of a confidential informant, but consideration of fundamental fairness sometimes requires that identity of such informant be revealed. *People v. Dailey*, 639 P.2d 1068 (Colo. 1982); *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

In determining whether the government's privilege of not disclosing informants should yield in a particular case, court must balance the public's interest in protecting the flow of information to law enforcement officials about criminal activity against the defendant's need to obtain evidence necessary for the preparation of a defense. *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

Defendant not entitled to the disclosure of informant based on assertion that his defense requires it, but such disclosure may be ordered only where the defendant has established a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused. *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

A defendant is presumptively entitled to cross-examine a prosecution witness as to the witness's address and place of employment. Absent sufficient justification for withholding this information, a defendant's right to it is unqualified, and the defendant is under no obligation to provide reasons for seeking it. *People ex. rel Dunbar v. District Court*, 177 Colo. 429, 494 P.2d 841 (1972); *People v. Thurman*, 787 P.2d 646 (Colo. 1990).

The trial court, in exercising its sound discretion, is in the best position to assess the basis for and seriousness of the witness's apprehension. When such apprehension is expressed, the key consideration for a trial court in assessing a defendant's constitutional claim to a witness's identity, address or place of employment is whether in absence of that information the defendant will have sufficient opportunity to place the witness in his proper setting. *People v. Thurman*, 787 P.2d 646 (Colo. 1990).

The rule that an adequate showing by the prosecution that the witness legitimately

fears for his safety requires some showing in turn by the defendant that the disclosure is so material as to outweigh the matter of the safety of the witness followed by a balancing of interests by the trial court should not be interpreted as requiring a threshold demonstration by the defendant that the information to be developed from learning the witness's identity, address and place of employment would prove highly material. The defendant's burden extends only to showing that the confidential informant is a material witness on the issue of guilt and that nondisclosure would deprive the defendant of a fair opportunity to test the witness's credibility. *People v. Thurman*, 787 P.2d 646 (Colo. 1990); *People v. Turley*, 870 P.2d 498 (Colo. App. 1993).

A witness's assertion of concern for personal safety does not have a talismanic quality automatically giving the witness the right to withhold information about identity, address and place of employment. Rather, the proper resolution of such issues requires careful attention to the facts of each case and application of the law concerning the right of an accused to confront adverse witnesses. *People v. Thurman*, 787 P.2d 646 (Colo. 1990).

Witnesses' personal safety outweighs defendant's confrontation right, as evidenced by the delay in the disclosure of their identities until they had been placed under witness protection. Witnesses' former addresses and telephone numbers should not be disclosed. *People v. District Court*, 933 P.2d 22 (Colo. 1997).

Dismissal of an action may be ordered in proper circumstances if the government declines to disclose a confidential informant in accordance with the court's order. *People v. Martinez*, 658 P.2d 260 (Colo. 1983); *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

Dismissal was not warranted where the evidence that the prosecution failed to disclose was not exculpatory to the defendant, and the trial court's proposed remedy was a continuance conditioned on defendant's waiver of speedy trial until the date of the continuance. *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998).

Trial court properly granted defendant additional time at trial to review previously undisclosed bank records for which summaries had been provided. Material was not exculpatory to defendant, there was no prejudice to defendant, and the information was relevant to show what defendant did with the victim's money. *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006).

The decision to order disclosure of a witness's address and place of employment was committed to the sound discretion of the trial court. If there is evidence in the record to support the trial court's order compelling disclosure despite the witness's apprehension, the

prosecution's willful refusal to comply with that order was properly sanctioned by the trial court under subsection (III)(g). *People v. Thurman*, 787 P.2d 646 (Colo. 1990).

The trial court acted within the bounds of its discretion in dismissing an information against the defendants where no actual threat was made against a witness, the trial court attempted to accommodate all parties by limiting disclosure to defense counsel alone, both the witness's and place of employment were withheld, and without the sought-after information the defense could not place the witness in her proper setting. *People v. Thurman*, 787 P.2d 646 (Colo. 1990).

Dismissal was appropriate sanction where disclosure of investigator's report of interview of victim was not made until after victim had testified, defense was in the midst of presenting its case, and alternative sanction of striking victim's testimony would have been tantamount to dismissal. *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

Written statements outside possession and control of prosecution cannot be discovered pursuant to this rule. *Dickerson v. People*, 179 Colo. 146, 499 P.2d 1196 (1972); *People v. Garcia*, 690 P.2d 869 (Colo. App. 1984).

However, statements in possession of police are within "possession or control" of the prosecuting attorney so as to meet the requirement of this rule. *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967).

Material in possession of the police is constructively in the possession of the prosecution. *People v. Lucero*, 623 P.2d 424 (Colo. App. 1980).

Offense report not within scope of discovery. An offense report, although signed by a complaining witness, is not within the scope of a pretrial discovery order as it is not a statement of a witness; it is, in fact, a compilation of information relating to the commission of crimes. *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975).

As internal police documents are not within purview of pretrial discovery order. *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975); *Losavio v. Mayber*, 178 Colo. 184, 496 P.2d 1032 (1972).

When contents of police records discoverable. Where the district attorney's office regularly receives information from police records, defense attorneys, including public defenders, are entitled to obtain such information in possession of prosecution. *Losavio v. Mayber*, 178 Colo. 184, 496 P.2d 1032 (1972).

Prosecution's failure to provide defendant with a written police incident report violated this section, but a new trial was not required because the report was either cumulative to information provided to the defense or was immaterial to the outcome of the trial, and the judge

allowed defendant a continuance to study the document and the opportunity to examine witnesses as to its contents. *People v. Banuelos*, 674 P.2d 964 (Colo. App. 1983).

Failure by prosecution to provide defendant statement codefendant made to federal drug enforcement administration agent harmless error because defendant was not tried jointly with codefendant who had already pled guilty and been sentenced prior to defendant's trial and because defendant knew of the statement and its contents but failed to request it. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following specific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. *People v. Trujillo*, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).

Where defendant received forensics report linking him to tire slashing incident prior to trial and the court allowed the defendant to interview the report's introducing witness prior to testifying, court's admission of the evidence in an arson prosecution was not reversible error even though defendant claimed the evidence had not been disclosed to him. *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), aff'd on other grounds, 2 P.3d 1283 (Colo. 2000).

Notes of interviews with witnesses discoverable. This rule includes not only materials which have been signed or adopted by the government's witness, but also notes taken by officers when talking to the witness. *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967).

Defendant's right to discovery of a witness's statement includes the right to examine notes which are substantial recitals of the statement and were reduced to writing contemporaneously with the making of the statement. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

All that is required is that notes be substantially verbatim recitals of the oral statement. *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Notes must not contain the interpretations, impressions, comments, ideas, opinions, conclusions, evaluations, or summaries of the person transcribing the notes. *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967).

Destruction of notes not necessarily violation of rule. Destruction of written notes made by a government agent during the taping of a phone conversation is not a violation of this rule when the substance of that conversation is set forth in the agent's formal report and made available to the defendant. *People v. Alonzi*, 40 Colo. App. 507, 580 P.2d 1263 (1978), aff'd, 198 Colo. 160, 597 P.2d 560 (1979).

Failure to disclose prosecutor's notes of an interview with a defense expert witness before the prosecutor relied on the notes when cross-examining the witness was harmless error, even if assumed to be a discovery violation, where the notes were provided to defense counsel during the cross-examination in time for redirect examination of the witness the next day. *People v. Pasillas-Sanchez*, 214 P.3d 520 (Colo. App. 2009).

Right to discover statements of prosecution witnesses not absolute. The defendant does not have an absolute right to discover statements of prosecution witnesses under any and all circumstances. *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974).

Witness statements included in prosecution's notes and emails are not automatically discoverable. Those statements are only provided to the defense if they contain exculpatory information or if the trial court, exercising its discretion, finds the information is relevant, unavailable from any other source, and request is reasonable. *People v. Vlassis*, 247 P.3d 196 (Colo. 2011).

Court granted discretion to require disclosure. This rule vests in the trial court discretion to require disclosure prior to trial of any relevant material and information. *People ex rel. Shinn v. District Court*, 172 Colo. 23, 469 P.2d 732 (1970).

Trial court must exercise sound discretion in permitting discovery under part I (e)(1) (now (d)(1)), guided by the standards suggested in part I (e)(2) (now (d)(2)). *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973); *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974).

And in granting discovery, court may enter appropriate protective orders under part III (d). *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974).

And trial court's discovery ruling may consider judicial economy as long as constitutional rights are not violated. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Defendant must prove prejudice to show abuse of discretion. To show an abuse of discretion in not permitting discovery, the facts must reveal that the defendant was prejudiced. *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973).

When court may refuse discovery of relevant testimony. It is within the sound discretion of the court to refuse to compel discovery

of what may be relevant testimony where defense counsel had the opportunity and failed to institute timely discovery. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

But discovery compelled when information of material importance to defense. Where the defense has made a specific request for certain information in the possession or control of the prosecution, discovery of that information is constitutionally compelled, not only when it is exculpatory, but also when it is of material importance to the defense. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *Chambers v. People*, 682 P.2d 1173 (Colo. 1984).

Discovery material used for impeachment purposes is of material importance. The use of discovery material for impeachment purposes implicates the due process rights of the defendant and is of material importance to the defense. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Hamer*, 689 P.2d 1147 (Colo. App. 1984).

Material to be used for impeachment purposes is subject to the discovery provisions of this rule. *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986).

"Material" defined. In the context of a completed trial, "material," constitutionally, means evidence which, when evaluated in light of the entire record, likely would have affected the outcome of the trial. *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Hamer*, 689 P.2d 1147 (Colo. App. 1984); *People v. Wilson*, 841 P.2d 337 (Colo. App. 1992).

And refusal to disclose such evidence mandates reversal. Where information sought on discovery by a defendant might have affected the outcome of the trial, failure to disclose that information mandates reversal of trial court's guilty verdict. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Minimal showing of necessity required of defendant. A defendant seeking disclosure must make a minimal showing of necessity, and mere speculation concerning the need for disclosure will not suffice. *People v. McLean*, 633 P.2d 513 (Colo. App. 1981).

Defense counsel to determine relevance and usefulness of statement to defense. Generally, defense counsel is the appropriate party to make the determination that a statement is relevant to the conduct of the defense. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Determination of usefulness of evidence under part I (e) (now (d)) is a defense function, not a prosecutorial function, as only the defense can determine what will be material and helpful to its case. *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974).

And statement need not be admissible to be relevant. A witness' statement, to be relevant, need not contain information admissible at trial, as long as the contents of the statement are

relevant to the conduct of the defense. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

But must tend to prove or disprove fact of consequence. Information which would not tend to prove or disprove any fact that is of consequence to the defendant's guilt or innocence is not relevant and need not be disclosed under part I (a)(1)(I). *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Whether nondisclosure is erroneous depends on all circumstances of case, the nature of the crime charged, and possible defenses, as well as the possible significance of the informant's testimony. *People v. Peterson*, 40 Colo. App. 102, 576 P.2d 175 (1977).

Prosecution not required to furnish statements of anticipated witnesses. A discovery order does not impose an affirmative obligation on the prosecution to reduce the oral statements of anticipated witnesses to writing and to furnish the substance of their testimony to the defense. *People v. Garcia*, 627 P.2d 255 (Colo. App. 1980).

Subsection (a)(1) of part I specifically requires disclosure only of the substance of oral statements made by the accused, or, if a joint trial is to be held, by a codefendant, and, aside from these specified situations, additional disclosure of oral statements is not mandated. *People v. Garcia*, 627 P.2d 255 (Colo. App. 1980).

Prosecution fulfilled its discovery obligations by providing notice that officer would testify and providing officer's written report. Prosecution was not required to reduce the substance of the officer's anticipated testimony to writing and furnish it to the defense before trial. *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

Subsection (I)(a)(1)(I) requires the prosecution to provide the defense only with the written statements of witnesses or any written reports that quote or summarize oral statements made by witnesses. If the supreme court had intended the disclosure of unrecorded oral statements, then it would have so specified. *People v. Denton*, 91 P.3d 388 (Colo. App. 2003).

No abuse of discretion where trial court found prosecution had not committed a discovery violation by failing to disclose certain oral statements that the victim made to a police officer and to the prosecutor. The victim's statements were not exculpatory, and nothing in the record suggests that the prosecutor or the police officer deliberately refrained from reducing the victim's statements to writing in order to avoid a discovery obligation. *People v. Denton*, 91 P.3d 388 (Colo. App. 2003).

When disclosure of rebuttal witness unnecessary. The requirement, contained in part (II)(c), that the prosecution disclose the identity of its rebuttal witnesses under certain circumstances, is inapplicable where the rebuttal testi-

mony is not introduced to refute a defense, but is introduced solely to impeach the credibility of a defense witness. *People v. Vollentine*, 643 P.2d 800 (Colo. App. 1982).

The disclosure requirements of this rule are not applicable to impeachment testimony which does not contradict alibi evidence but does attack the credibility of defense witnesses on matters collateral to the alibi defense. *People v. Muniz*, 622 P.2d 100 (Colo. 1980).

And prosecution not required to disclose which witnesses will be called for rebuttal. Neither this rule nor § 16-5-203 specifically requires the prosecution to endorse or to disclose which of the endorsed witnesses it will call for rebuttal. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981); *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

Disclosure of identity of confidential informant. The prosecution's privilege to refuse to disclose the identity of a confidential informant is subject to a defendant's right to disclosure of the identity of an informant when the informant's testimony or identity is relevant or helpful to the defense of the accused or is necessary to a fair determination of the cause. *People v. McLean*, 633 P.2d 513 (Colo. App. 1981).

When determining whether the identity of a confidential informant should be disclosed, the trial court must balance the needs of law enforcement officials to preserve the anonymity of the informant with the defendant's right to obtain evidence necessary for the preparation of his defense. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

When informant's identity to be disclosed. The interests of a fair trial require disclosure of the informant's identity if the facts reveal that he is "so closely related" to the defendant as to make his testimony highly material. *People v. Peterson*, 40 Colo. App. 102, 576 P.2d 175 (1977).

When informant's identity not be disclosed. There was no prejudicial error in the denial of appellant's motion to disclose the informer's identity where the trial judge concluded that the public's and the informer's interest in preserving his anonymity outweighed appellant's interest in disclosure. *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977).

This rule does not require the prosecution to specifically identify that a witness is an expert witness, although that is the better practice. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

Under reciprocal discovery order, defendant was not entitled to disclosure of police interview with witness which concerned crime other than that with which the defendant was charged. *People v. Green*, 759 P.2d 814 (Colo. App. 1988).

Prosecution's duty is to keep in contact with witness to offense. The prosecution is under a duty to make reasonable and good faith efforts to keep in contact with an eye and ear witness to an alleged criminal offense from the time the decision to file charges is made. *People v. Velasquez*, 645 P.2d 850 (Colo. 1982); *People v. Rodriguez*, 645 P.2d 851 (Colo. 1982); *People v. Wandel*, 696 P.2d 288 (Colo. 1985), *cert. denied*, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

However, this duty does not include the obligation to establish and employ a regularized method of maintaining contact with the informant. *People v. Wandel*, 696 P.2d 288 (Colo. 1985), *cert. denied*, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

Lack of full name or current address not violation of disclosure obligation. Although the prosecution is obligated to provide all pertinent information in its possession which might assist the defense in locating the informant, if such information does not contain the informant's full name or current address, the disclosure obligation may, nonetheless, still be satisfied. *People v. Velasquez*, 645 P.2d 850 (Colo. 1982); *People v. Rodriguez*, 645 P.2d 851 (Colo. 1982).

Charges dismissed for failure to disclose informant's address. *People v. Velasquez*, 645 P.2d 850 (Colo. 1982); *People v. Rodriguez*, 645 P.2d 851 (Colo. 1982).

Prosecution must disclose to the defense any evidence within the prosecution's possession or control that tends to negate the guilt of the accused as to the offense charged, or tends to reduce the punishment therefor. *People v. Bradley*, 25 P.3d 1271 (Colo. App. 2001).

Tangible evidence must be preserved and made available to defendant, where it may assist defense. *People v. Morgan*, 199 Colo. 237, 606 P.2d 1296 (1980).

Requirements of part I (a)(1)(IV) (now (a)(1)(III)) met. Where the trial court denied a defense motion to allow the defense's expert to examine a sample of the alleged cocaine in the expert's lab, but did allow the defense expert to examine a sample of cocaine in the forensic laboratory at the Denver general hospital and also ordered the disclosure of the test results of the people's expert, this met the requirements of part I (a)(1)(IV) (now (a)(1)(III)). *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974).

Test to determine whether destruction of evidence violates due process. There is a three-prong test to determine whether the loss or destruction of evidence by the state, with the result that the defendant is denied access to that evidence, violates a defendant's right to due process of law: (1) Whether the evidence was suppressed or destroyed by the prosecution; (2) whether the evidence is exculpatory; and (3) whether the evidence is material to the defen-

dant's case. *People v. Garries*, 645 P.2d 1306 (Colo. 1982).

For the imposition of a judicial sanction in connection with a defendant's due process claim based upon the loss or destruction of evidence, the record must show that the destroyed evidence is constitutionally material. *People v. Shaw*, 646 P.2d 375 (Colo. 1982). (See note above, with the catchline "'Material' defined.")

No due process violation where mere claim that evidentiary material could have been subjected to tests and a failure to preserve that evidence, unless an accused can show bad faith on the part of the police. *People v. Wyman*, 788 P.2d 1278 (Colo. 1990); *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999).

Failure to comply with this rule is not reversible error unless the withheld evidence was material to guilt or punishment. No due process violation unless the accused can show bad faith by the police or the prosecution. *People v. Bradley*, 25 P.3d 1271 (Colo. App. 2001).

Where testimony about destroyed evidence suppressed, defendant not entitled to dismissal of complaint. Where all physical evidence collected by law enforcement officers in the investigation of a crime was destroyed or released prior to the defendant's arrest, so it was unavailable to him at trial, and the defendant is granted an order suppressing testimony by officers about the missing evidence, he is not entitled to a dismissal of the complaint against him. *People v. Archuleta*, 43 Colo. App. 474, 607 P.2d 1032 (1979).

Discovery during trial of prior out-of-court statement. Under this rule defense counsel is provided with access to a witness' out-of-court statements immediately after the witness testifies on direct examination. *Robles v. People*, 178 Colo. 181, 496 P.2d 1003 (1972).

Notes of district attorney are not within ambit of this rule and are not to be furnished to defense counsel. *Hopper v. People*, 152 Colo. 405, 382 P.2d 540 (1963); *Rapue v. People*, 171 Colo. 324, 466 P.2d 925 (1970); *Norman v. People*, 178 Colo. 190, 496 P.2d 1029 (1972).

Prosecution's notes on voir dire are protected by the work product doctrine even under a Batson challenge. *People v. Trujillo*, 15 P.3d 1104 (Colo. App. 2000).

Record of witnesses' oral statement not protected as work product. Where the majority of notes are in substance a record of oral statements made by witnesses, such notes are not protected by the work-product exception. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Finding of denial of fair trial because of violation of rule. *People v. Edgar*, 40 Colo. App. 377, 578 P.2d 666 (1978).

Where district attorney learned of physician's opinion in an oral interview, and it appeared that the interview was not recorded in

any manner, and the defense learned of physician's opinion before trial and did not request a continuance, the district attorney was under no duty to furnish the opinion to the defendant, and there was no prejudice to defendant. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

A compelling reason or need for an involuntary psychological examination of a victim must be shown before the trial court will grant such a motion by the defense. The defendant's right to a fair trial must be balanced against the victim's privacy interests. *People v. Chard*, 808 P.2d 351 (Colo. 1991); *People v. Turley*, 870 P.2d 498 (Colo. App. 1993).

Defendant failed to show he was prejudiced by the late disclosure of the prosecution's expert's report where, at the time the report was disclosed, defendant had already obtained the services of an expert witness to examine evidence and 25 days still remained to review prosecution's expert's report and perform additional tests if desired. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

Defendant's failure to move for continuance, after admission of incriminating evidence at trial, discredited any claim of prejudice arising from alleged discovery violation. *People v. Wieghard*, 727 P.2d 383 (Colo. App. 1986).

Mere speculation regarding the court's disposition of a motion for a continuance or to recall a witness does not obviate the defendant's duty to seek such procedures if the defendant is to base his claim of prejudice on the inability to prepare new theories of defense or to cross-examine past witnesses in light of previously undisclosed evidence. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

Information in possession of detective concerning drug use and crimes of prosecution witness is covered by this rule, and failure of prosecution to disclose such information violates this rule even if prosecutor had no actual knowledge of the information. *People v. District Court*, 793 P.2d 163 (Colo. 1990).

Trial court's refusal to order the prosecution to obtain and disclose the criminal histories of all prosecution witnesses, including police officers, was not in error. Trial court's order requiring the prosecution to disclose any criminal history of a police officer witness of which it is aware was also held to not be in error. *People v. Fox*, 862 P.2d 1000 (Colo. App. 1993).

The sanction for nondisclosure applies only against the prosecution and not against a co-defendant; a co-defendant in a joint trial should be able to use prior felony convictions to impeach the testimony of a defendant who chooses to testify. *People v. Lesney*, 855 P.2d 1364 (Colo. 1993).

No mistrial resulted when the prosecution refused to provide defendant with the readouts printed by the instruments used to reach the test results. This rule requires only that the expert's report and the results be provided, and defendant had the results for four months before trial and did not file a motion indicating the results were incomplete or inadequate. *People v. Evans*, 886 P.2d 288 (Colo. App. 1994).

Defendant's statement was not subject to the mandatory disclosure provisions of subsection (I)(a)(2), or the constitutional obligation to disclose exculpatory information where the trial court found defendant's testimony implausible and essentially made a finding of fact that the statement was not made. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

Prosecution not required to disclose derivative trial exhibits of identical content that prosecution prepared from disclosed material. *People v. Armijo*, 179 P.3d 134 (Colo. App. 2007).

Applied in *People v. Shannon*, 683 P.2d 792 (Colo. 1984); *People v. Doss*, 782 P.2d 1198 (Colo. App. 1989); *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

III. DISCLOSURE TO PROSECUTION.

Part II (b) is constitutional on its face, as it does not violate the privilege against self-incrimination. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975).

Part II (c) is constitutional on its face, as it does not violate the privilege against self-incrimination. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975).

Trial court to determine whether discovery will violate defendant's constitutional rights. The trial court, in ruling on the prosecution's motions under this rule, must first determine whether discovery which has been objected to will constitute a violation of the defendant's constitutional rights. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975); *People v. Castro*, 854 P.2d 1262 (Colo. 1993).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) Whether the discovery violation was willful or in bad faith; (2) the materiality of the evidence excluded; (3) the extent to which the prosecution will be surprised or prejudiced; (4) the effectiveness of less severe sanctions; and (5) whether the defendant himself knew of or cooperated in the discovery violation. *People v. Pronovost*, 756 P.2d 387 (Colo. App. 1987).

Balancing approach applied in *People v. Pronovost*, 756 P.2d 387 (Colo. App. 1987).

Discovery of statements of nonexpert defense witnesses not authorized. Part II (c) nei-

ther explicitly nor implicitly authorizes trial courts to grant prosecution motions for pretrial discovery of statements of nonexpert defense witnesses. *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981).

Scope of part II (c) does not purport to extend to work product. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975).

But discovery of defense theories and names of supporting witnesses permitted upon condition. By its direct and uncontradicted terms, part II (c) permits discovery of defense theories and the names of supporting witnesses only when the defendant intends to introduce them at trial. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975).

Demonstrative, nontestimonial evidence. While the privilege against self-incrimination does not extend to demonstrative evidence obtained from a defendant or from a witness, demonstrative evidence is limited to nontestimonial evidence such as fingerprints, blood specimens, handwriting examples, photographs and other evidence of similar character. *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981).

When request for disclosure by prosecution invalid. The request for disclosure by the prosecution under this rule may be overbroad and, therefore, invalid if it seeks information which might serve as an unconstitutional link in a chain of evidence tending to establish the accused's guilt of a criminal offense. *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975); *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981).

This rule governs a prosecution request for nontestimonial identification once judicial proceedings against a defendant have been initiated. *People v. Angel*, 701 P.2d 149 (Colo. App. 1985).

A prosecuting attorney has both a statutory and a constitutional obligation to disclose to the defense any material, exculpatory evidence he possesses; however, failure to disclose information helpful to the accused results in a violation of due process only where the evidence is "material" either to guilt or punishment. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

More specifically, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

"Reasonable time" requirement of rule violated when defendant failed to respond to prosecution's specification for several months or until actual commencement of trial unless there is a showing of unusual circumstances. *People v. Hampton*, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

Factors for determining when exclusion of alibi testimony is proper are discussed in *People v. Hampton*, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

The trial court, after applying the factors for determining when exclusion of alibi testimony is proper, determined that the exclusion of the alibi evidence was appropriate under the facts of the case and the trial court's exercise of its discretionary authority will not be overturned on appeal because the trial court did not abuse its discretion. *People v. Hampton*, 758 P.2d 1344 (Colo. 1988) (decided under former Crim. P. 12.1).

No abuse of discretion when court prohibited defense witness from testifying when the defense did not disclose the witness within the time period in the rule and failed to articulate why the disclosure was made late. In addition, the witness was not a key witness, and the evidence that the witness was going to rebut was rebutted by another defense witness. *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Although a prosecutor's duty to disclose potentially exculpatory evidence is not limited by the circumstances of known defense theories or considerations of relevancy, reversible error did not exist since the only evidence linking gun to the shooting in question was its discovery in the back seat of the suspects' vehicle and there was no reasonable probability that had the evidence been disclosed, the result of the trial would have been different. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

Although an alibi defense not an affirmative defense so as to place on the People the burden of proof to rebut, and trial court did not err by refusing a theory of case instruction treating alibi as an affirmative defense, defendant was entitled to a properly worded instruction setting forth his theory of the case. *People v. Nunez*, 824 P.2d 54 (Colo. App. 1991).

Notice of alibi is admissible as a prior inconsistent statement when a defendant testifies at trial in a manner inconsistent with such notice. *People v. Lowe*, 969 P.2d 746 (Colo. App. 1998).

Defendant's statement to psychiatrist that was provided to the prosecution under this rule loses its confidential nature and cross-examination of the defendant concerning such statements as prior inconsistent statements is proper impeachment, even if the psychiatrist did not testify at the defendant's trial. Use of such statements do not violate the attorney-client privilege or the right to effective assistance of counsel. *People v. Lanari*, 811 P.2d 399 (Colo. App. 1989), aff'd, 827 P.2d 495 (Colo. 1992).

Purpose of the rule is fulfilled by the entry of a not guilty plea followed by no further disclosure of defenses, which operates to inform the prosecution that the defense is a general denial. *People v. Castro*, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Nor does the rule require disclosure of intent to cross-examine prosecution witnesses. *People v. Castro*, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Exclusion of a defense witness by the court as a sanction against the defense attorney, for failing to disclose such witness to the prosecution in violation of this rule, was excessive and violated defendant's right to challenge a prosecution witness's credibility through cross-examination based on testimony that would have been given by the excluded witness. *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

Although the trial court has broad discretion in deciding the appropriate course of action in response to a violation of this rule by the defense, it must consider: (1) The reason for and degree of culpability associated with the violation; (2) the extent of resulting prejudice to the other party; (3) any events after the violation that mitigate such prejudice; (4) reasonable and less drastic alternatives to exclusion; and (5) any other relevant facts. *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

Because the error violated the defendant's right under the sixth amendment to confront the witnesses against him and caused material prejudice to his defense, the error was not harmless beyond a reasonable doubt and required a new trial. *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

Prosecution could not be sanctioned for police conduct in which it did not participate. Trial court may not preclude prosecution from applying for and obtaining order for nontestimonial identification evidence though blood and hair samples obtained by police through a warrantless search were suppressed. *People v. Diaz*, 55 P.3d 1171 (Colo. 2002).

IV. REGULATION.

Rule relates only to pretrial discovery and not to posttrial discovery. *Royal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Preservation of evidence upon motion for protective order. If the government seeks a protective order regarding grand jury testimony, the court should first examine "in camera" the material sought to be protected before making its ruling, and if material is withheld from the defendant under such an order, it should be sealed by the court and preserved for consideration on appeal. *Parlapiano v. District Court*, 176 Colo. 521, 491 P.2d 965 (1971).

Introduction of identification testimony within court's discretion. But where a trial judge, after considering the totality of the circumstances at an "in camera" hearing, permits the introduction of identification testimony, he does not abuse his discretion, and a reviewing court will not substitute its judgment for that of the trial court. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Trial court properly allowed witness endorsed as a perceiving witness to testify as an expert witness after defense raised the issue related to the expertise at trial. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

In camera review of documents obtained only by showings of necessity and undue hardship. Although subsection (f) of part III allows for in camera review of documents to determine whether they are covered by attorney work-product doctrine, the party seeking inspection in camera of confidential portions of the attorney's documents must show necessity and that obtaining the information through other means would cause undue hardship. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

If, however, parties in a discovery dispute must resort to court intervention, the moving party must show that other means of resolving the dispute have been exhausted and that the requested relief is narrowly tailored to fit the implied waiver of the attorney-client privilege involved. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

Sanction within discretion of trial court. Whether the sanction imposed by the trial court for failure to comply with section (c) of part II is appropriate, under the facts and circumstances of a case, is a matter which is within the sound discretion of the trial court. *People v. Lyle*, 200 Colo. 236, 613 P.2d 896 (1980); *People v. Madsen*, 743 P.2d 437 (Colo. App. 1987).

A trial judge has broad discretion in considering motions to endorse additional witnesses and fashioning remedies for violations of a discovery order under this rule. *People v. District Court*, 664 P.2d 247 (Colo. 1983).

Trial court need not prevent district attorney from using evidence that was not disclosed to defendant when the court recessed for the day to permit defense time to investigate evidence and the substance of the evidence was similar to other statements which had been disclosed. *People v. Hammons*, 771 P.2d 1 (Colo. App. 1988).

When exercising its discretion in fashioning remedies for violations of this rule, the trial court should impose the least severe sanction that will ensure full compliance with the court's discovery orders. *People v. District Court*, 793 P.2d 163 (Colo. 1990); *People v. Castro*, 854 P.2d 1262 (Colo. 1993); *People v. Lee*, 18 P.3d 192 (Colo. 2001).

The trial court should also take into account the reason why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. *People v. District Court*, 793 P.2d 163 (Colo. 1990); *People v. Castro*, 854 P.2d 1262 (Colo. 1993); *People v. Lee*, 18 P.3d 192 (Colo. 2001).

Sanction held to abridge right to fair trial. Discovery sanction which substantially prevents the negation of the prosecution's direct testimony, abridges defendant's right to a fair trial and constitutes an abuse of discretion. *People v. Willis*, 667 P.2d 246 (Colo. App. 1983).

Sanction held not to be abuse of discretion. An order preventing the district attorney from using certain evidence is a harsh sanction, but it is not necessarily an abuse of discretion. *People v. District Court*, 664 P.2d 247 (Colo. 1983).

Sanction of excluding presentation of evidence by a defendant is a matter of judicial discretion to be preceded by adequate inquiry into circumstances of defendant's noncompliance with court's discovery order and effect of exclusion. *People v. Reger*, 731 P.2d 752 (Colo. App. 1986).

Factors pertinent to sanction of excluding evidence for noncompliance with a discovery order include reason for and degree of culpability associated with failure to timely respond to prosecution's request for discovery, whether and to what extent nondisclosure prejudiced prosecution's opportunity effectively to prepare for trial, whether events occurring subsequent to noncompliance mitigate prejudice to prosecution, whether there is a reasonable and less drastic alternative to preclusion of evidence, and any other relevant factors arising out of circumstances of the case. *People v. Reger*, 731 P.2d 752 (Colo. App. 1986).

Monetary sanction payable from public funds for violation of discover rules is beyond authority of district court. *People v. District Court*, 808 P.2d 831 (Colo. 1991).

Preclusion is proper method to assure compliance with discovery order. *People v. Patterson*, 189 Colo. 451, 541 P.2d 894 (1975).

Sanction of a continuance held to be abuse of discretion where delay was not attributable to the defendant and he was thereby denied his right to a speedy trial. *People v. Castro*, 835 P.2d 561 (Colo. App. 1992), *aff'd*, 854 P.2d 1262 (Colo. 1993).

Decision whether to continue trial is within court's sound discretion, even when a defendant asserts a need to prepare to meet unexpected or newly discovered evidence or testimony. Trial court properly denied defense motion for continuance where prosecution's toxicologist had been endorsed two months before trial and materials used by toxicologist during his testimony were made during trial.

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) The reason for and the degree of culpability associated with the failure to timely respond to the prosecution's specification of time and place; (2) whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial; (3) whether events occurring subsequent to the defendant's non-compliance mitigate the prejudice to the prosecution; (4) whether there is a reasonable and less drastic alternative to the preclusion of alibi (or other defense) evidence; (5) and any other relevant factors arising out of the circumstances of the case. *People v. Hampton*, 696 P.2d 765 (Colo. 1985); *People v. Pronovost*, 773 P.2d 555 (Colo. 1989); cert. denied, 785 P.2d 611 (Colo. 1990).

Exclusion or suppression of exculpatory evidence which should have been disclosed by prosecution to defense does not further search for truth and is not merited by the possible deterrence of prosecutorial misconduct, where the prosecutor had no actual knowledge of the evidence, where the evidence is crucial to the case, where a continuance would cure any prejudice suffered by the defendant because of the violation of the rule, and where the prosecutor did not willfully act in bad faith. *People v. District court*, 793 P.2d 163 (Colo. 1990).

No prosecutorial misconduct exists where the prosecutor leaves it to the discretion of the potential witness as to whether the witness talks to the defendant's investigator. *People v. Antunes*, 680 P.2d 1321 (Colo. App. 1984).

It was an abuse of discretion to exclude DNA evidence when record supported prosecutor's explanation that she was complying with court's earlier directives, when such exclusion could have a potentially distorting effect on truth finding, and when record shows that continuance may have been adequate to cure any prejudice suffered by defendant. *People v. Lee*, 18 P.3d 192 (Colo. 2001).

It was an abuse of discretion to impose sanctions that were tantamount to dismissal of the charges where trial court had found no bad faith or willful violation of this rule and determined that dismissal would be inappropriate. *People v. Daley*, 97 P.3d 295 (Colo. App. 2004).

V. PROCEDURE.

Discovery rules not applicable to extradition proceedings. Allowing full discovery in

extradition proceedings would defeat the limited purpose of the habeas corpus hearing. *Temen v. Barry*, 695 P.2d 745 (Colo. 1984).

Evidentiary hearing on disclosure. Once a defendant has made an initial showing of the necessity for disclosure, the issue becomes an evidentiary matter for resolution by the trial court and an evidentiary hearing normally will be required. *People v. McLean*, 633 P.2d 513 (Colo. App. 1981).

Rule not guide as to when discovery to take place. This rule is only intended to create a cut-off time for the filing of discovery motions, and offers no guidance as to when the discovery should take place. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Procedure for exchange of statements from prosecution to defense counsel established. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Informally or through in camera proceedings, the trial court should have examined the requested medical files to determine which portions, if any, were defense counsel's work product and therefore entitled to protection from discovery. On completing the examination, the trial court should have protected confidential or privileged material, only allowing disclosure of the files after defense counsel had an opportunity to excise any confidential or privileged material. *People v. Ullery*, 984 P.2d 506 (Colo. 1999).

The court erred by allowing the jurors to take juror notebooks home, but the error was not a structural error requiring reversal. The error was not a fundamentally serious error that would prevasively prejudice the entire of the proceedings. *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002).

Failure to allow defense counsel to review juror notebooks prior to trial is harmless error if counsel is allowed to review the notebook during trial and make objections. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

Jury notebooks are not to supplant the requirement of Crim. P. 30 that jurors be orally instructed prior to closing arguments. *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004).

Part V (c) applies only to materials that are discoverable and actually received by the requesting party. Any other reading would require a requesting party to pay for materials that requesting party might not be allowed to review. *People v. Trujillo*, 114 P.3d 27 (Colo. App. 2004).

Rule 17. Subpoena

In every criminal case, the prosecuting attorneys and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness upon the trial or other hearing.

(a) **For Attendance of Witnesses — Form — Issuance.** A subpoena shall be issued either by the clerk of the court in which case is filed or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. It shall state the name of the court and the title, if any, of the proceedings, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) **Pro Se Defendants.** Subpoenas shall be issued at the request of a pro se defendant, as hereinafter provided. The court or a judge thereof, in its discretion in any case involving a pro se defendant, may order at any time that a subpoena be issued only upon motion or request of a pro se defendant and upon order entered thereon. The motion or request shall be supported by an affidavit stating facts supporting the contention that the witness or the items sought to be subpoenaed are material and relevant and that the defendant cannot safely go to trial without the witness or items which are sought by subpoena. If the court is satisfied with the affidavit it shall direct that the subpoena be issued.

(c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(d) **Service on a Minor.** Service of a subpoena upon a parent or legal guardian who has physical care of an unemancipated minor that contains wording commanding said parent or legal guardian to produce the unemancipated minor for the purpose of testifying before the court shall be valid service compelling the attendance of both said parent or legal guardian and the unemancipated minor for examination as witnesses. In addition, service of a subpoena as described in this subsection shall compel said parent or legal guardian either to make all necessary arrangements to ensure that the unemancipated minor is available before the court to testify or to appear in court and show good cause for the unemancipated minor's failure to appear.

(e) **Service.** Unless service is admitted or waived, a subpoena may be served by the sheriff, by his deputy, or by any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena may be made by delivering a copy thereof to the person named. Service may also be made in accordance with section 24-21-204(4), C.R.S. Service is also valid if the person named has signed a written admission or waiver of personal service. If ordered by the court, a fee for one day's attendance and mileage allowed by law shall be tendered to the person named if the person named resides outside the county of trial.

(f) **Place of Service.**

(1) **In Colorado.** A subpoena requiring the attendance of a witness at a hearing or trial may be served anywhere within Colorado.

(2) **Witness from Another State.** Service on a witness outside this state shall be made only as provided by law.

(g) **For Taking Deposition — Issuance.** A court order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described in the order.

(h) Failure to Obey Subpoena.

(1) **Contempt.** Failure by any person without adequate excuse to obey a duly served subpoena may be deemed a contempt of the court from which the subpoena issued. Such contempt is indirect contempt within the meaning of C.R.C.P. 107. The trial court may issue a contempt citation under this subsection (1) whether or not it also issues a bench warrant under subsection (2) below.

(2) Trial Witness — Bench Warrant.

(A) When it appears to the court that a person has failed without adequate excuse to obey a duly served subpoena commanding appearance at a trial, the court, upon request of the subpoenaing party, shall issue a bench warrant directing that any peace officer apprehend the person and produce the person in court immediately upon apprehension or, if the court is not then in session, as soon as court reconvenes. Such bench warrant shall expire upon the earliest of:

- (i) submission of the case to the jury; or
- (ii) cancellation or termination of the trial.

(B) Upon the person's production in court, the court shall set bond.

Source: (d) amended June 19, 1986, effective January 1, 1987; (c) amended and effective October 31, 1996; (d) to (h) amended November 4, 1999, effective January 1, 2000; entire rule amended and effective September 4, 2003; (e) amended and adopted October 15, 2009, effective January 1, 2010; (h) amended and adopted April 23, 2012, effective July 1, 2012.

Cross references: For fees of witnesses, see §§ 13-33-102 and 13-33-103, C.R.S.

ANNOTATION

A defendant is not entitled to issue ex parte subpoenas duces tecum by leave of the court. The fifth and sixth amendments to the federal constitution do not give the defendant the right to engage in this type of discovery without providing the information to the prosecution. *People v. Baltazar*, 241 P.3d 941 (Colo. 2010).

Effect of failure of subpoenaed witness to appear. Under some circumstances, failure of court to grant continuance or to order mistrial when witness who has been subpoenaed fails to appear requires reversal. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

A trial court does not abuse its discretion in denying a continuance because the defendant's psychiatric witness who had not been served with a subpoena failed to appear. *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Order of court should be required before a subpoena duces tecum is issued. *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971).

During the course of a criminal prosecution, the prosecution may compel production of telephone and bank records through the use of a subpoena duces tecum so long as the defendant has the opportunity to challenge the subpoena for lack of probable cause. Use of a subpoena duces tecum for such records is not an unreasonable search and seizure provided that it is supported by probable cause and is properly defined and executed. *People v. Mason*, 989 P.2d 757 (Colo. 1999).

Probable cause for issuance of a subpoena duces tecum for obtaining telephone and bank records exists if there is a reasonable likelihood that the evidence sought exists and that it would link the defendant to the crime charged. *People v. Mason*, 989 P.2d 757 (Colo. 1999).

District attorney has standing to challenge defense subpoena of third party. As the prosecuting party, the district attorney has an independent interest in ensuring the propriety of third-party subpoenas as part of the management of the case and the prevention of complainant or witness harassment through improper discovery. *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).

To withstand challenge to criminal pretrial third-party subpoena, defendant must demonstrate: (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis; (2) that the materials are evidentiary and relevant; (3) that the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) that the application is made in good faith and is not intended as a general fishing expedition. *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).

In addition to this basic test, for subpoenas issued for materials that may be protected by

privilege or a right to confidentiality, a balancing of interests is necessary and the defendant must make a greater showing of need. In camera review may be necessary in some instances, but is not mandated. *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).

Witnesses for indigent defendants. The expenses of obtaining the testimony of witnesses for an indigent defendant must be paid by the state. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Defendant must establish indigency to satisfaction of court. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

No authority to quash properly issued subpoena. There is no authority under this rule to quash a subpoena if the district attorney has complied with the technical requirements. *People v. Ensor*, 632 P.2d 641 (Colo. App. 1981).

Mailing a subpoena to a witness, without more, does not comply with the requirements in section (e). The record does not indicate that the prosecution exercised diligence in trying to obtain the witness' presence. *People v. Stanchieff*, 862 P.2d 988 (Colo. App. 1993).

Subpoena served by mail insufficient to invoke contempt. A subpoena served by mail,

pursuant to an administrative order, is insufficient to invoke the sanction of contempt under section (h). *People v. Mann*, 646 P.2d 352 (Colo. 1982).

For in camera examination of subpoenaed bank records, see *Pignatiello v. District Court*, 659 P.2d 683 (Colo. 1983).

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following specific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. *People v. Trujillo*, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).

Applied in *People v. Duncan*, 179 Colo. 253, 500 P.2d 137 (1972); *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976); *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978).

V. VENUE

Rule 18. Venue

Comment. The place for trying criminal cases is governed by applicable statutes or rules, such as section 18-1-202 (general venue statute), section 13-73-107 and section 13-74-107 (on statewide and judicial district grand jury indictments), section 18-2-202 (2) (a) (conspiracy), section 18-3-304 (4) (violation of custody orders), and section 19-2-105 (juvenile cases), as well as section 16-6-101 et seq. and Crim. P. 21 (change of venue), or the state or federal constitutions.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; entire rule amended and adopted March 4, 2004, effective July 1, 2004.

ANNOTATION

- I. General Consideration.
- II. Place of Trial.

I. GENERAL CONSIDERATION.

Applied in *People v. Gould*, 193 Colo. 176, 563 P.2d 945 (1977); *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

II. PLACE OF TRIAL.

Burden is on the state to prove venue in a criminal prosecution. *Stout v. People*, 171 Colo. 142, 464 P.2d 872 (1970).

But venue is a matter which may be proved by positive testimony or inferred from proof of other facts. *Stout v. People*, 171 Colo. 142, 464 P.2d 872 (1970).

For venue is a matter to be determined from all evidence in the case. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Venue may be established by circumstantial evidence. *People v. Bd.*, 656 P.2d 712 (Colo. App. 1982).

Waiver of error related to venue. Any error relating to venue, not mentioned during trial, in motion for acquittal, or in motion for a new trial, is waived, and cannot be raised on appeal.

People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Failure of county resident to pay taxes constitutes act in that county. Failure of a Pueblo county resident to pay taxes or file a

return constitutes an act in Pueblo county in furtherance of the crimes charged, within the meaning of this rule. People v. Vickers, 199 Colo. 305, 608 P.2d 808 (1980).

Rule 19. No Colorado Rule

Rule 20. No Colorado Rule

Rule 21. Change of Venue or Judge

(a) Change of Venue.

(1) **For Fair or Expeditious Trial.** The place of trial may be changed when the court in its sound discretion determines that a fair or expeditious trial cannot take place in the county or district in which the trial is pending.

(2) The Motion for Change of Venue.

(I) A motion for a change of venue shall be in writing and accompanied by one or more affidavits setting forth the facts upon which the moving party relies, or in lieu of such affidavits the motion, with approval of the court, may contain a stipulation of the parties to a change of venue.

(II) The written motion and the affidavits shall be served upon the opposing party 7 days before the hearing; the nonmoving party may submit a written brief or affidavit or both in opposition to the motion.

(III) As soon as practicable, the court may hold a hearing on the motion.

(3) **Effect of Motions.** After a motion for a change of venue has been denied, the applicant may renew his motion for good cause shown, if since denial he has learned of new grounds for a change of venue. All questions concerning the regularity of the proceedings in obtaining changes of venue or the right of the court to which the change is made to try the case and execute the judgment, and all grounds for a change of venue, shall be considered waived if not raised before trial.

(4) **Order of Change.** Every order for a change of venue shall be in writing, signed by the judge, and filed by the clerk with the motion as a part of the record in the case. The order shall state the court to which venue has been changed and the date and time at which the defendant shall appear at said court. The bond made, if any, shall remain in force and effect.

(5) **Disposition of Confined Defendant.** When the defendant is in custody, the court shall order the sheriff, or other officer having custody of the defendant, to remove him not less than 7 days before trial to the jail of the county to which the venue is changed and there deliver him together with the warrant under which he is held, to the jailer. The sheriff or other officers shall endorse on the warrant of commitment the reason for the change of custody, and deliver the warrant, with the prisoner, to the jailer of the proper county, who shall give the sheriff or other officer a receipt and keep the prisoner in the same manner as if he had originally been committed to his custody.

(6) **Transcript of Record.** When a change of venue is granted, the clerk of the court from which the change is granted shall immediately make a full transcript of the record and proceedings in the case, and of the motion and order for the change of venue, and shall transmit the same, together with all papers filed in the case, including the indictment or information, complaint, or summons and complaint, and bonds of the defendant and of all witnesses, to the proper court. When the change is granted to one or more, but not of several defendants, a certified copy of the indictment or information, and of each other paper in the case, shall be transmitted to the court to which the change of venue is ordered. Such certified copies shall stand as the originals, and the defendant shall be tried upon them. The transcript and papers may be transmitted by mail, or in any other way the court may direct. The clerk of the court to which the venue is changed shall file the transcript and papers transmitted to him, and docket the case; and the case shall proceed before and after judgment, as if it had originated in that court.

(7) **Imprisonment.** When after a change of venue the defendant is convicted and sentenced to imprisonment in the county jail, the sheriff shall transport him at once to the county where the crime was committed if that county has a jail or other place of confinement.

(b) Substitution of Judges.

(1) Within 14 days after a case has been assigned to a court, a motion, verified and supported by affidavits of at least two credible persons not related to the defendant, may be filed with the court and served on the opposing party to have a substitution of the judge. Said motion may be filed after the 14-day period only if good cause is shown to the court why it was not filed within the original 14-day period. The motion shall be based on the following grounds:

(I) The judge is related to the defendant or to any attorney of record or attorney otherwise engaged in the case; or

(II) The offense charged is alleged to have been committed against the person or property of the judge, or of some person related to him; or

(III) The judge has been of counsel in the case; or

(IV) The judge is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

(3) Upon the filing of a motion under this section (b), all other proceedings in the case shall be suspended until a ruling is made thereon. If the motion and supporting affidavits state facts showing grounds for disqualification, the judge shall immediately enter an order disqualifying himself or herself. Upon disqualifying himself or herself, the judge shall notify forthwith the chief judge of the district, who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the state court administrator, who shall obtain from the Chief Justice the assignment of a replacement judge.

Source: (a)(2)(II), (a)(5), and IP(b)(1) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. Change of Venue.

II. Substitution of Judges.

I. CHANGE OF VENUE.

Right to fair and impartial jury is a constitutional right which can never be abrogated. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

Change of venue subject to judicial discretion. Motion for change of venue due to local prejudice is a matter of judicial discretion. *People v. Simmons*, 183 Colo. 253, 516 P.2d 117 (1973).

Trial court has inherent power to change venue on its own motion if such action is necessary to provide a fair trial and, in appropriate circumstances, may do so over the defendant's objections. *Wafai v. People*, 750 P.2d 37 (Colo. 1988).

Question of prejudice one of fact. The question as to the existence of prejudice such as would dictate the granting of a motion for a change of venue is one of fact and rests within the sound discretion of the trial court. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968);

Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Inquiry on review relating to fair trial. Regardless of the means imposed by the trial judge to insure the accused's constitutional right to a fair trial by a panel of impartial jurors, the critical inquiry on appellate review is whether the chosen means did in fact preserve the accused's right to a fair trial. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

When change of venue must be granted. If a community is prejudiced against a citizen, or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971); *Sergent v. People*, 177 Colo. 354, 497 P.2d 983 (1972); *Sollitt v. District Court*, 180 Colo. 114, 502 P.2d 1108 (1972).

Denial of fair trial may be presumed when pretrial publicity is massive, pervasive, and prejudicial. *People v. Simmons*, 183 Colo. 253, 516 P.2d 117 (1973).

Showing required when pretrial publicity not presumptively prejudicial. Where a defendant has not demonstrated the existence of mas-

sive, pervasive, and prejudicial publicity, which would create a presumption that he was denied a fair trial, he must establish the denial of a fair trial based upon a nexus between extensive pre-trial publicity and the jury panel. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

If prejudice exists, it should show up in the voir dire examination. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

Burden of showing partiality of jurors met. Where it is shown that a significant number of jurors entertained an opinion of the defendant's guilt, had been exposed to pre-trial publicity, and had knowledge of the details of the crime, the defendant has met his burden of showing the existence of an opinion in the minds of the jurors which raises a presumption of partiality. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Failure to grant change of venue not error. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973); *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Change of venue is available pursuant to writ of habeas corpus. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

II. SUBSTITUTION OF JUDGES.

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a recent case relating to the personal interest of judge in case, see 15 Colo. Law. 1609 (1986).

Rule to be strictly applied. This rule and its statutory counterpart on change of judge must be strictly applied. *People in Interest of A.L.C.*, 660 P.2d 917 (Colo. App. 1982).

Purpose of section (b) is to guarantee that no person is forced to stand trial before a judge with a bent of mind. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Judge's duty to sit on case unless prejudiced. Unless a reasonable person could infer that the judge would in all probability be prejudiced against the petitioner, the judge's duty is to sit on the case. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Prejudice is mental condition or status, a certain bent of mind, which cannot be demonstrated, ordinarily, by direct proof. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

To be distinguished from normal personal opinions. Prejudice must be distinguished from the sort of personal opinions that as a matter of course arise during a judge's hearing of a cause. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Discourteousness or rudeness do not dictate disqualification. It does not comport with sound judicial policy or the intent of either section (b) or § 16-6-201 to require disqualifi-

cation of a judge solely on the basis of subjective conclusions that he was discourteous or rude. *Carr v. Barnes*, 196 Colo. 70, 580 P.2d 803 (1978).

But appearance of possible prejudice can dictate disqualification. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

In reviewing the motion and affidavits, both the actuality and appearance of fairness must be considered. Even where the trial judge is convinced of his own impartiality, the integrity of the judicial system is impugned when it appears to the public that the judge is partial. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Section (b) of this rule has uniformly been applied in disqualification cases. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Rule measures timeliness of motion to disqualify. One apparent purpose of section (b) of this rule was to provide a standard by which to measure timeliness of a motion for disqualification, whether filed pursuant to § 16-6-201, or to this rule. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Later discovered or occurring disqualifying facts. When disqualifying facts do not occur or are not discovered by the moving party until after expiration of the time within which the motion and affidavits normally must be presented, application for a change of judge is timely if made as soon as possible after occurrence or discovery of those facts. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Good cause for delay in filing shown. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Because prosecutor did not argue to the trial court that the motion was untimely and court did not consider the timeliness issue and further because the motion to recuse was triggered by comments the trial judge made at sentencing, good cause existed for the late filing. *People v. Barton*, 121 P.3d 230 (Colo. App. 2004).

Timeliness and sufficiency of motion and affidavit deemed questions of law. Whether the motion is timely and whether it sufficiently states grounds for disqualification are questions of law subject to plenary review. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

A motion for recusal must be verified and supported by affidavits of at least two credible witnesses not related to defendant. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Whether recusal is required will depend on whether defendant's motion and supporting affidavits set forth legally sufficient facts upon which bias or prejudice may be implied. *James v. People*, 727 P.2d 850 (Colo. 1986); *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

And facts in affidavits and motion taken as true. As a matter of judicial policy courts must take as true, for purposes of a motion to disqualify, facts stated in the affidavits and motion. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *People v. Botham*, 629 P.2d 589 (Colo. 1981).

The facts set forth in affidavits supporting a motion to disqualify a judge are not subject to a trial court's inquiry, but are presumed to be true. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Cook*, 22 P.3d 947 (Colo. App. 2000); *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

Thus, the trial judge engaging in this inquiry cannot pass upon the truth or falsity of statements of fact in the motion and supporting affidavits. *Estep v. Hardeman*, 705 P.2d 523 (Colo. 1985); *S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988); *Brewster v. District Court*, 811 P.2d 812 (Colo. 1991).

The judge must confine the analysis to the four corners of the motion and supporting affidavits, and then determine as a matter of law whether they allege legally sufficient facts for disqualification. *Klinck v. District Court*, 876 P.2d 1270 (Colo. 1994).

Recusal not discretionary where affidavits sufficiently allege prejudice. The trial judge has no discretion in the matter of recusing himself upon finding the affidavits sufficient under the rule to allege prejudice. He immediately loses all jurisdiction in the matter except to grant the change. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *Brewster v. District Court*, 811 P.2d 812 (Colo. 1991).

Test of sufficiency of motion and affidavit. The test of the legal sufficiency of a motion to disqualify a judge is whether the motion and affidavits state facts from which it may reasonably be inferred that the respondent judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the petitioner. *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Baca*, 633 P.2d 528 (Colo. App. 1981); *People v. Hrapski*, 718 P.2d 1050 (Colo. 1986).

To be sufficient, the affidavits must state facts from which the respondent judge's prejudice may reasonably be inferred. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Test is applied in *Estep v. Hardeman*, 705 P.2d 523 (Colo. 1985).

There can be no presumption that a judge is intimidated by the outrage of the community in which the judge serves. Thus, motion for disqualification properly denied where there was no allegation that the judge was in fact intimidated by the community's animosity toward the defendant. *People v. Vecchio*, 819 P.2d 533 (Colo. App. 1991).

Prejudgments regarding the quality of evidence to be heard are not consistent with the duty of a trial court to reach an unbiased decision after weighing all the evidence. *Estep v. Hardeman*, 705 P.2d 523 (Colo. 1985).

Subjective conclusion of party not sufficient. Neither § 16-6-201 nor section (b) of this rule requires disqualification of a judge on the basis of a party's subjective conclusion that the judge is not impartial because of acts or statements made by the party. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

And motion without supporting affidavits or facts insufficient. Where defendant filed no affidavits and alleged no facts which would reasonably indicate that the judge was interested or prejudiced with respect to the case, the parties, or counsel, the defendant's motion to disqualify the judge was insufficient as a matter of law. *People v. Johnson*, 634 P.2d 407 (Colo. 1981).

The mere allegation that a trial judge engaged in an ex parte communication with a doctor who would testify as an expert witness is not alone sufficient to require recusal of the trial judge. *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996).

Recusal not required where the trial court's statements merely consisted of comments about a second co-defendant as part of the consideration of mitigating factors during sentencing of first co-defendant, and not statements expressing bias or prejudice about the second co-defendant, especially when judge specifically refused at the co-defendant's sentencing hearing to speculate as to co-defendant's role in the crimes charged. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

An appearance of impropriety cannot be inferred simply because the judge was a member of the general public that witnessed the fire started by defendant or because the judge assisted in general relief efforts. *People v. Barton*, 121 P.3d 230 (Colo. App. 2004).

However, numerous other allegations of the judge's personal involvement and comments made by the judge during the sentencing hearing about his or her personal experience presented legally sufficient basis to create the appearance of prejudice that could have prevented the judge from dealing fairly with the defendant. *People v. Barton*, 121 P.3d 230 (Colo. App. 2004).

Trial judge's presence in courtroom in which defendant allegedly threatened a witness did not require recusal. A mere order for an investigation of threat did not create a potential conflict of interest or indicate that the judge might become a witness. *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

Defendant's attorney may file affidavit in support of motion for substitution of judge where the attorney-affiant is not related to the defendant within the third degree by blood,

adoption, or marriage. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

To disqualify, suit against judge must be probably successful. To create an adverse interest sufficient to disqualify a trial judge from presiding over a criminal trial, a suit brought against him by the accused person must have some probability of success. *Watson v. People*, 155 Colo. 357, 394 P.2d 737 (1964), cert. denied, 380 U.S. 966, 85 S. Ct. 1111, 14 L. Ed. 2d 156 (1965).

Challenged judge may request hearing before another judge. A challenged judge in juvenile delinquency matters may, after self-disqualification, request a hearing before another judge on the issues raised in respondent's motion and affidavits. *People in Interest of A.L.C.*, 660 P.2d 917 (Colo. App. 1982).

Referring a motion for substitution to another judge for decision is not reversible error, even if it is not the procedure contemplated by this rule. *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996).

Disqualification where court only determining matters of law. It is unnecessary to determine whether a trial judge errs in not disqualifying himself where the error committed by him is not prejudicial error in that there is no disagreement over the facts and the sole material determinations to be made by the trial court are matters of law, in which case an appellate court is to determine whether the trial court correctly ruled on such matters. *Robran v. People ex rel. Smith*, 173 Colo. 378, 479 P.2d 976 (1971).

A judge's bias or prejudice against defense counsel, while not generally requiring recusal, may so require when the judge's manifestation of hostility or ill will is apparent from the motion and affidavits and indicates the absence of the impartiality required for a fair trial. *Brewster v. District Court*, 811 P.2d 812 (Colo. 1991).

A government attorney is not an "attorney otherwise engaged in the case" unless he has worked on it directly. While a partner in a law firm is said to be "engaged" in every case in which a member of his firm represents a party because he has a financial interest in the case's outcome, a government lawyer's compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case. *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984).

Judges are not disqualified solely on the basis that they were formerly employed by the prosecutor's office. Instead, when employed by that office, the judge to be disqualified must have performed some role in the case or have obtained actual knowledge of disputed evidentiary facts of the case. *People v. Julien*, 47 P.3d 1194 (Colo. 2002).

Where defendant failed to submit affidavits in accordance with requirements of § 16-2-201 and section (b) of this rule, and supplied allegations himself that record did not verify, there were insufficient grounds for disqualification. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Where defendant failed to present evidence to substantiate his claim that the judge knew of circumstances that would disqualify him from presiding in case and improperly filed a motion for case transfer with another trial court judge but failed to inform presiding judge of defendant's motion or to seek a decision on such motion, there were insufficient grounds for disqualification. *People v. Harmon*, 3 P.3d 480 (Colo. App. 2000).

Mere filing of complaint with the judicial performance commission, without more, does not establish sufficient grounds for recusal. Further, county court judge's decision to recuse herself in seven prior cases does not lead to the conclusion that she should permanently recuse herself in all cases involving the attorneys. *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

Rule 22. Time of Motion to Transfer

A motion for a change of venue or for a change of judge under these Rules may be made at or before arraignment or, for good cause shown for a late filing, at any time before trial.

VI. TRIAL

Rule 23. Trial by Jury or to the Court

(a) (1) Every person accused of a felony has the right to be tried by a jury of twelve. Before the jury is sworn, the defendant may, except in class 1 felonies, elect a jury of less than twelve but no fewer than six, with the consent of the court.

(2) Every person accused of a misdemeanor has the right to be tried by a jury of six. Before the jury is sworn, the defendant may elect a jury of less than six but no fewer than three, with the consent of the court.

(3) Every person accused of a class 1 or class 2 petty offense has the right to be tried by a jury of three, if he or she:

- (I) Files a written jury demand within 21 days after entry of a plea;
- (II) Tenders twenty-five dollars to the court within 21 days after entry of a plea, unless such fee is waived by the judge because of the indigence of the defendant. If the charge is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court, at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be returned to the defendant.
- (4) The jury, in matters involving class 1 and class 2 petty offenses, shall consist of a greater number than three, not to exceed six, if requested by the defendant in the jury demand.
- (5) (I) The person accused of a felony or misdemeanor may, with the consent of the prosecution, waive a trial by jury in writing or orally in court. Trial shall then be to the court.
- (II) The court shall not proceed with a trial to the court after waiver of jury trial without first determining:
- That the defendant's waiver is voluntary;
 - That the defendant understands that:
 - The waiver would apply to all issues that might otherwise need to be determined by a jury including those issues requiring factual findings at sentencing;
 - The jury would be composed of a certain number of people;
 - A jury verdict must be unanimous;
 - In a trial to the court, the judge alone would decide the verdict;
 - The choice to waive a jury trial is the defendant's alone and may be made contrary to counsel's advice.
- (III) In a proceeding where the waiver of a jury trial is part of a determination preceding the entry of a guilty or nolo contendere plea, the court need only make the determinations required by Rule 11(b) and not those required by this rule.
- (6) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, with the consent of the prosecution, may permit withdrawal of the waiver prior to the commencement of the trial.
- (7) In any case in which a jury has been sworn to try a case, and any juror by reason of illness or other cause becomes unable to continue until a verdict is reached, the court may excuse such juror. Except in class 1 felonies, if no alternate juror is available to replace such juror, the defendant and the prosecution, at any time before verdict, may stipulate in writing or on the record in open court, with approval of the court, that the jury shall consist of less than twelve but no fewer than six in felony cases, and less than six but no fewer than three in misdemeanor cases, and the jurors thus remaining shall proceed to try the case and determine the issues.
- (8) All jury verdicts must be unanimous.

COMMITTEE COMMENT

Amended Rule 23(a)(5) reflects the legislature's 1989 decision to condition a defendant's waiver of a jury trial upon the consent of the prosecution. See 1989 S.B. 246, Section 35, amending Section 16-10-101, C.R.S. See also *People v.*

District Court, 731 P.2d 720, 722 (Colo. 1987). Also, consistent with Colorado caselaw, the amended rule would permit the waiver of a jury trial even in a class 1 felony case. See *People v. Davis*, 794 P.2d 159, 209-12 (Colo. 1990).

Source: (a)(1) and (a)(2) amended June 9, 1988, effective January 1, 1989; headnote (a) repealed and (a)(5) amended July 16, 1992, effective November 1, 1992; (a)(5) amended and adopted September 7, 2006, effective January 1, 2007; entire rule amended and effective April 17, 2008; entire rule corrected July 16, 2008, effective *nunc pro tunc* April 17, 2008; (a)(3) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Annotator's note. For other annotations concerning the right to trial by jury, see § 23 of art. II, Colo. Const., and § 18-1-406.

Section 18-1-406 (1) and this rule, which provide for six jurors in misdemeanor cases, are constitutional under § 23 of art. II of the Colorado Constitution. *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005).

Right to waive trial by jury is substantive in nature. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Rule conflicts with § 18-1-406. Subsection (a)(5) of this rule and § 18-1-406 (2) are not reconcilable and are in direct conflict with each other. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

And section 18-1-406 (2) controls over subsection (a)(5) of this rule, so that the consent of the prosecuting attorney cannot be imposed as a condition on right to waive trial by jury. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Defendant must personally waive right to jury. The plain meaning of subsection (a)(5) requires that a defendant personally waive his right to a jury trial and that a statement by his counsel does not operate as a waiver. *Rice v. People*, 193 Colo. 270, 565 P.2d 940 (1977); *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980); *Moore v. People*, 707 P.2d 990 (Colo. 1985).

A waiver must be understandingly, voluntarily, and deliberately made. A defendant in a criminal case may waive his right to a jury trial; however, that waiver must be understandingly, voluntarily, and deliberately made, and a determination of waiver must be a matter of certainty and not implication. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980); *Moore v. People*, 707 P.2d 990 (Colo. 1985).

Presumption accorded waiver of jury trial. Where, when the jury was assembled in the courtroom ready for trial, defendants' counsel orally announced that defendants had decided to waive their right to a jury trial, and the court inquired of each defendant if that was their desire and both indicated in the affirmative, and as a further precaution, the court then insisted that a written waiver of jury trial be prepared and be signed by each defendant and their counsel, which was done, it will be presumed that defendants understandingly, voluntarily, and deliberately decided to waive the jury. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Advisement by court did not substantially comply with this rule, however the remedy is not an automatic new trial. The proper remedy is a postconviction evidentiary hearing. *People v. Walker*, __ P.3d __ (Colo. App. 2011).

Waiver not constitutional right. The defendant in a criminal case does not have a constitutional right to waive a jury and be tried by the

court. *People v. Linton*, 193 Colo. 64, 565 P.2d 919 (1977).

Effect of waiver. Where the defendant voluntarily and with advice of counsel waived a jury trial, defendant in such circumstances cannot be heard to complain when he creates a situation which necessarily makes the trial judge both the one who decides the admissibility of evidence and the one who renders the verdict. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Waiver is effective where defendant fails to present evidence from which it could be reasonably inferred that the waiver was not voluntary, knowing, and intentional. *People v. Porterfield*, 772 P.2d 638 (Colo. App. 1988).

Jury to be sworn. While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, subsection (a)(7) of this rule and subsection (b)(2) and section (e) of Crim. P. 24, implicitly require that a jury will be sworn to try a case. *Hollis v. People*, 630 P.2d 68 (Colo. 1981).

But delayed swearing not error. Where no prejudice is shown by the delayed swearing of the jury, no objection is made, and the oath is administered before the jury retires to begin its deliberations, the error is harmless. *Hollis v. People*, 630 P.2d 68 (Colo. 1981).

Juror properly dismissed and replaced. A juror, after being sequestered for eight days, was properly dismissed and replaced with an alternative when the juror was shown to be quite nervous and upset, and no evidence of prejudice against the defendant was shown by the dismissal and replacement of the juror. *People v. Evans*, 674 P.2d 975 (Colo. App. 1983).

Requirement of written stipulation to jury of less than 12 met. Where defense counsel stipulates to a jury of less than 12 in open court and on the record, the requirement of section (a)(7) that the stipulation be in writing is met. *People v. Waters*, 641 P.2d 292 (Colo. App. 1981).

Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and not with respect to alternative means by which the crime was committed. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Although there is a statutory right to a unanimous verdict in criminal cases in Colorado, the state constitution does not explicitly guarantee the right to a unanimous verdict. Nevertheless, there are some cases in which the jury may return a general verdict of guilty when instructed on alternative theories of principal and complicitor liability and in which the state constitution has provided a criminal defendant the right to a unanimous jury verdict. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Subsection (a)(5)(II) is intended to require that trial courts conduct on-the-record advisements to defendants, informing them of specific elements of their right to a trial by jury and of certain consequences if they waive that right. *People v. Montoya*, 251 P.3d 35 (Colo. App. 2010).

Trial court did not substantially comply with subsection (a)(5)(II)(b) due to omissions in the court's advisement to defendant about the waiver. Nor did the omissions in the advisement merely constitute a "slip-up" by the trial court. *People v. Montoya*, 251 P.3d 35 (Colo. App. 2010).

Advisement regarding waiver was not deficient simply because trial court did not advise defendant of the possible penalties upon conviction. Such an advisement is neither required nor necessary. *People v. Montoya*, 251 P.3d 35 (Colo. App. 2010).

Where advisement is deficient under subsection (a)(5)(II), the appropriate remedy is to remand the case to the trial court for an evidentiary hearing to resolve defendant's challenge to the validity of the waiver of a jury trial. *People v. Montoya*, 251 P.3d 35 (Colo. App. 2010).

The right to a 12-person jury is purely statutory. The sixth and fourteenth amend-

ments to the U.S. Constitution guarantee the right to trial by jury, but do not, nor does the Colorado Constitution guarantee the right to a 12-person jury. *People v. Chavez*, 791 P.2d 1210 (Colo. App. 1990).

Constitutional right to a jury of 12 lies only with felony cases and does not extend to misdemeanor cases. A defendant in a misdemeanor case does not have a constitutional right under art. II, § 23, of the Colorado Constitution to demand a 12-person jury. *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005).

The statutory right to a 12-person jury could be waived by counsel's statements. The requirement that a defendant must make a written or oral "announcement" of his intention to waive a jury does not extend to a reduction in the number of jurors. *People v. Chavez*, 791 P.2d 1210 (Colo. App. 1990).

Defense counsel stipulation to a jury of less than 12 in open court and on the record satisfies the statutory requirement that the stipulation must be in writing. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

Applied in *Hawkins v. Superior Court*, 196 Colo. 86, 580 P.2d 811 (1978); *People v. Ledman*, 622 P.2d 534 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

Rule 24. Trial Jurors

(a) Orientation And Examination Of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

- (i) The grounds for challenge for cause;
- (ii) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;
- (iii) The identities of the parties and their counsel;
- (iv) The nature of the case using applicable instructions if available or, alternatively a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements;

(v) General legal principles applicable to the case including the presumption of innocence, burden of proof, definition of reasonable doubt, elements of charged offenses and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.

(b) Challenges for Cause.

(1) The court shall sustain a challenge for cause on one or more of the following grounds:

(I) Absence of any qualification prescribed by statute to render a person competent as a juror;

(II) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(III) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or associated in business with, or surety on any bond or obligation for, any defendant;

(IV) The juror is or has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;

(V) The juror has served on the grand jury which returned the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or the information, or on any other investigatory body which inquired into the facts of the crime charged;

(VI) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(VII) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(VIII) The juror was a witness to any matter related to the crime or its prosecution;

(IX) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court;

(XI) [Reserved]

(XII) The juror is an employee of a public law enforcement agency or public defender's office.

(2) If either party desires to introduce evidence, other than the sworn responses of the prospective juror, for the purpose of establishing grounds to disqualify or challenge the juror for cause, such evidence shall be heard and all issues related thereto shall be determined by the court out of the presence of the other prospective jurors. All matters pertaining to the qualifications and competency of the prospective jurors shall be deemed waived by the parties if not raised prior to the swearing in of the jury to try the case, except that the court for good cause shown or upon a motion for mistrial or other relief may hear such evidence during the trial out of the presence of the jury and enter such orders as are appropriate.

(c) Challenge to Pool.

(1) Upon the request of the defendant or the prosecution in advance of the commencement of the trial, the defendant or the prosecution shall be furnished with a list of prospective jurors who will be subject to call in the trial.

(2) Either the prosecution or the defendant may challenge the pool on the ground that there has been a substantial failure to comply with the requirements of the law governing the selection of jurors. Such challenge must be made in writing setting forth the particular

ground upon which it is based and shall be accompanied by one or more affidavits specifying the supporting facts and demographic data. The challenge must be filed prior to the swearing in of the jury selected to try the case.

(3) If the court finds the affidavit or affidavits filed under subsection (2) of this section, if true, demonstrate a substantial failure to comply with the "Uniform Jury Selection and Service Act", the moving party is entitled to present in support of the motion the testimony of any person responsible for the implementation of the "Uniform Jury Selection and Service Act." Any party may present any records used in the selection and summoning of jurors for service, and any other relevant evidence. If the court determines, by a preponderance of the evidence, that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with the "Uniform Jury Selection and Service Act", the court shall discharge the jury panel and stay the proceedings pending the summoning of a new juror pool or dismiss an indictment, information, or complaint, or grant other appropriate relief.

COMMITTEE COMMENT

These changes were made in order to conform Rule 24 to the legislative changes in the Colorado Uniform Jury Selection and Service Act,

Sections 13-71-101 to 13-71-145, C.R.S. which became effective January 1, 1990.

(d) Peremptory Challenges.

(1) For purposes of Rule 24 a capital case is a case in which a class 1 felony is charged.

(2) In capital cases the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases where there is one defendant and the punishment may be by imprisonment in a correctional facility, the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in a correctional facility, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summons and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.

(3) For good cause shown, the court at any time may add peremptory challenges to either or both sides.

(4) Peremptory challenges shall be exercised by counsel, alternately, the first challenge to be exercised by the prosecution. A prospective juror so challenged shall be excused, and another juror from the panel shall replace the juror excused. Counsel waiving the exercise of further peremptory challenges as to those jurors then in the jury box may thereafter exercise peremptory challenges only as to jurors subsequently called into the jury box without, however, reducing the total number of peremptory challenges available to either side.

COMMITTEE COMMENT

The rule is changed to permit, but not to require, the court to allow the simultaneous

questioning of more than 12 potential jurors and one or two alternate jurors at one time. Further,

the rule permits, but does not require, the court to allow the exercise of peremptory challenges, in writing, in its discretion, as is done in civil

cases. This rule change is intended to apply to both district and county court criminal cases.

(e) Alternate Jurors.

The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors.

(f) Custody of Jury.

(1) The court should only sequester jurors in extraordinary cases. Otherwise, (J)urors should be permitted to separate during all trial recesses, both before and after the case has been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be given to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff whenever they are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.

(g) **Juror Questions.** Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

Source: (e) amended September 20, 1984, effective January 1, 1985; (d)(4) amended June 9, 1988, effective January 1, 1989; the introductory portion to (c), (c)(2), and (c)(3) amended July 16, 1992, effective November 1, 1992; (e) amended February 4, 1993, effective April 1, 1993; (a) repealed and readopted and (f)(1) amended June 25, 1998, effective January 1, 1999; (b)(1)(XI) repealed and reserved March 11, 1999, effective July 1, 1999; (g) added and adopted February 19, 2003, effective July 1, 2004.

Cross references: For the "Uniform Jury Selection and Service Act", see article 71 of title 13, C.R.S.

ANNOTATION

- I. General Consideration.
- II. Examination.
- III. Challenges for Cause.
 - A. In General.
 - B. Effect of Juror's Opinion or Interest.
 - C. Public Law Enforcement Agency or Public Defender's Office Employee as Juror.
 - D. Determination of Juror's Fitness.
- IV. Peremptory Challenges.
- V. Custody of Jury.
- VI. Alternate Jurors.
- VII. Juror Questions.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Challenges for Cause in Criminal Trials", see 12 Colo. Law. 1799 (1983). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with co-conspirators and voir dire, see 61 Den. L.J. 310 (1984). For article, "Curbing the Prosecutor's Abuse of the Peremptory Challenge", see 14 Colo. Law. 1629 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses recent

cases relating to peremptory challenges on the basis of race, see 15 Colo. Law. 1609 (1986).

Standard of review is "abuse of discretion". Phrases used in prior case law such as "clear abuse of discretion" and "gross abuse of discretion" are deemed to express this standard and have the same meaning. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Defendant entitled to impartial jury. It is fundamental to the right to a fair trial that a defendant be provided with an impartial jury. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980); *People v. Gurule*, 628 P.2d 99 (Colo. 1981); *People v. Collins*, 730 P.2d 293 (Colo. 1986).

Although a defendant is entitled to a trial by a fair and impartial jury, he is not entitled to any particular juror. *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

The right to an impartial jury does not require counsel be granted unlimited voir dire examination. *People v. O'Neill*, 803 P.2d 164 (Colo. 1990).

And discrimination in summoning of jurors may be ground for reversal. Counsel may request, in the presence of the presiding judge, or the judge himself may direct, that only good and lawful men be summoned as jurors; but to discriminate in favor of or against any class of citizens eligible for jury duty would be a grievous wrong. Whether such intermeddling would be ground for reversal depends upon the circumstances of the case. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

Qualified person should not be excused except for statutory reason. Jury service being an obligation of citizenship, the court should not excuse a person otherwise qualified for jury service for any reason short of the statutory criteria of "undue hardship, extreme inconvenience, or public necessity" set out in § 13-71-112 (2). *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Jury to be sworn. While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, subsection (b)(2) and section (e) of this rule and Crim. P. 23(a)(7) implicitly require that a jury will be sworn to try a case. *Hollis v. People*, 630 P.2d 68 (Colo. 1981).

And delayed swearing not necessarily error. Where no prejudice is shown by the delayed swearing of the jury, no objection is made, and the oath is administered before the jury retires to begin its deliberations, the error is harmless. *Hollis v. People*, 630 P.2d 68 (Colo. 1981).

A ruling by the trial court which calls an alternative juror to replace a juror who becomes "disqualified" to perform his duties is a matter within the discretion of the trial court and will not be disturbed on review unless an

abuse of discretion is shown. *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

It is within the trial court's prerogative to give considerable weight to a potential juror's statement that he or she can fairly and impartially serve on the case. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

This rule is not in agreement with § 16-10-105 because that section requires that jurors may be replaced with alternate jurors before deliberations begin and not after. Since the court rules govern practice and procedure in civil and criminal cases while the statute affects the substantive right to a fair trial, § 16-10-105 is the operative provision in deciding that the trial court erred by applying section (e) of this rule and allowing the replacement of a regular juror with an alternate juror after the jury had begun its deliberations. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

Trial court's use of random selection to choose alternate juror was error, but, in the absence of any prejudice demonstrated against the defendant, it was harmless error. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

The purpose of seating an alternate juror is to have available another juror when, through unforeseen circumstances, a juror is unable to continue to serve and the trial court is in the best position to evaluate whether a juror is unable to serve, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion. *People v. Abbott*, 690 P.2d 1263 (Colo. 1984); *People v. Christopher*, 896 P.2d 876 (Colo. 1995).

Applied in *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149 (1965); *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970); *People v. Bercillio*, 179 Colo. 383, 500 P.2d 975 (1972); *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978); *Kaltenbach v. Julesburg Sch. Dist. Re-1*, 43 Colo. App. 150, 603 P.2d 955 (1979); *People v. Velarde*, 200 Colo. 374, 616 P.2d 104 (1980); *People v. Gonzales*, 631 P.2d 1170 (Colo. App. 1981); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986).

II. EXAMINATION.

Purpose of voir dire examination is to enable counsel to determine whether any prospective jurors are possessed of beliefs which would cause them to be biased in such a manner as to prevent his client from obtaining a fair and impartial trial. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974); *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), *rev'd* on other grounds, 712 P.2d 1023 (Colo. 1986); *People v. Collins*, 730 P.2d 293 (Colo. 1986).

While a defendant does not have a constitutional right to voir dire a prospective jury panel, such right is expressly granted under rules of criminal procedure. *People v.*

Lefebvre, 981 P.2d 650 (Colo. App. 1998), *aff'd* on other grounds, 5 P.3d 295 (Colo. 2000).

Court may limit, but may not deny, the defendant's right to voir dire. People v. Lefebvre, 981 P.2d 650 (Colo. App. 1998), *aff'd* on other grounds, 5 P.3d 295 (Colo. 2000).

The court's error in denying defense counsel the right to question a prospective juror who was excused by the court does not constitute prejudice requiring a reversal of the conviction where defendant does not allege that the jury that was seated was unfair or partial and where the prosecution did not exhaust its peremptory challenges and thus could have removed the prospective juror even if the court had not excused him. People v. Evans, 987 P.2d 845 (Colo. App. 1998).

The knowledge or ignorance of prospective jurors concerning questions of law is generally not a proper subject of inquiry for voir dire. People v. Collins, 730 P.2d 293 (Colo. 1986).

Restrictions within court's discretion. Restrictions on the scope of the voir dire examination are within the trial court's discretion, and will not be reversed on appeal absent an abuse of that discretion. People v. Saiz, 660 P.2d 2 (Colo. App. 1982); People v. Rivers, 727 P.2d 394 (Colo. App. 1986); People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

If there is firm and clear evidence that a potential juror holds an actual bias that is unlikely to change through education concerning the trial process, exposure to basic principles governing criminal trials, or questioning by the court or the parties, the judge is permitted to excuse that juror without additional questioning. Under subsection (a)(3) of this rule, a trial judge must ordinarily permit voir dire of jurors in circumstances that could involve actual bias. Such questioning is useful to determine whether the juror can set aside bias and decide the case based on the evidence presented and the court's instructions. However, the trial need not waste time on further questioning where there is firm and clear evidence that a juror is unfit to serve under subparagraph (b)(1)(X) of this rule or if there is implied bias under subparagraphs (b)(1)(I) through (IX) or (b)(1)(XII) of this rule. People v. Lefebvre, 5 P.3d 295 (Colo. 2000).

Trial court abused its discretion in dismissing jurors without allowing the defense to question them where the record did not contain firm and clear evidence that the jurors removed for cause held actual biases that they could not set aside. The following responses on a written questionnaire were insufficient to support dismissal for cause without further questioning: Juror's assertion that he could not be fair because his brother had been convicted of the same offense with which defendant was charged; juror's assertion that a prior criminal background would prevent him

from being fair; and juror's statement that he could not be fair because his sister serves as an expert witness and he had not liked the district attorney's treatment of her on the witness stand. People v. Lefebvre, 5 P.3d 295 (Colo. 2000).

Propriety of questions within discretion of trial court. The propriety of questions to potential jurors on voir dire is within the discretion of the trial court, and its ruling thereon will not be disturbed on appeal unless an abuse of that discretion is shown. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972); People v. Collins, 730 P.2d 293 (Colo. 1986); People v. Shipman, 747 P.2d 1 (Colo. App. 1987).

Trial court did not abuse its discretion in disallowing one of defense counsel's questions that went to the defendant's theory of the case. The court permitted other questions that allowed the defendant to determine whether potential jurors held certain attitudes toward the defendant's affirmative defense. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), *rev'd* on other grounds, 807 P.2d 570 (Colo. 1991).

Rule expressly authorizes counsel to directly question prospective jurors and the judge cannot require counsel to submit questions to prospective jurors through the judge. The judge may, however, limit counsel's questions if they are unduly repetitious, irrelevant, or otherwise improper. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

The court's blanket prohibition against questions regarding a prospective juror's understanding of an instruction is an abuse of discretion where the court makes no inquiry as to the nature of the questions. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

Trial court's failure to conduct examination not plain error. Trial court's failure to explain to potential jurors the qualifications for jury service, the grounds for challenges for cause, and juror's duty to inform the court of anything that would disqualify them from service was not plain error when no party objected. People v. Page, 907 P.2d 624 (Colo. App. 1995).

Court's questioning and "rehabilitation" of prospective jurors was not improper where the questions were directed to eliciting information on the subject of the prospective jurors' possible bias and were no more leading than necessary. People v. James, 981 P.2d 637 (Colo. App. 1998).

III. CHALLENGES FOR CAUSE.

A. In General.

Distinguishing between challenges. Courts distinguish between challenges "propter affectum", those relating to a juror's bias, prejudice, interest, etc., and challenges "propter defectum", those relating to the absence of some

purely statutory qualification such as residence, citizenship, property owning, taxpaying, etc., holding that disregard of the former constitutes reversible error but not disregard of the latter. Also, in case of the former, prejudice to the litigant may be assumed; in case of the latter, it must be shown. Exceptions to this rule are not wanting, but these rest generally upon special facts and are supported by sound reason. *Harris v. People*, 113 Colo. 511, 160 P.2d 372 (1945).

Examination and disposal of challenges within discretion of court. The method and order of procedure in ascertaining the qualifications of veniremen and in disposing of challenges for cause are commonly in the discretion of the court. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 P. 680 (1912).

But discretion is not an arbitrary one, and a party is not to be unreasonably denied a challenge to which he shows himself entitled, because his right in such case is a substantial right which it is not within the discretion of the court to take away. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 P. 680 (1912).

Determination of the trial court upon a question of fact is not subject to review in challenges to jurors. *Union Gold Mining Co. v. Rocky Mt. Nat'l Bank*, 2 Colo. 565 (1875), *aff'd*, 96 U.S. 640, 24 L. Ed. 648 (1877).

Challenge need not be made immediately when grounds become apparent. The challenge of a particular juror for cause need not be made at the very time when the ground of challenge becomes apparent and before proceeding to the examination of another juror. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 P. 680 (1912).

Improper for court to require challenge for cause, and subsequent argument, in the presence of potential jurors. However, not plain error requiring reversal of conviction where there is no evidence in record supporting assertion that the challenged jurors were biased by hearing the challenges for cause nor were the challenges so obviously inflammatory to raise the presumption that bias resulted. *People v. Flockhart*, __ P.3d __ (Colo. App. 2009).

No dismissal if juror will render impartial verdict. No juror can be dismissed for cause if the trial court is satisfied the juror will render an impartial verdict. *People v. Romero*, 42 Colo. App. 20, 593 P.2d 365 (1978).

No abuse of discretion to deny challenge for cause where trial court conducted inquiry of juror who was related to sheriff's posse members and was satisfied with juror's specific assurances that she could render a fair and impartial verdict. *People v. Goodpaster*, 742 P.2d 965 (Colo. App. 1987).

No abuse of discretion to deny challenge for cause where trial court concluded that prospective juror, who was a neighbor of police officer who would be testifying, specifically stated that

he would not give more or less credibility to the officer's testimony as a result. *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998).

No abuse of discretion in denying challenge for cause where trial court determined that first cousin of investigating police department's chief of police who indicated that while her relationship with the mother of the chief could create a hardship for her she could nonetheless be impartial. *People v. Pasillas-Sanchez*, 214 P.3d 520 (Colo. App. 2009).

Missing portion of transcript of voir dire proceedings does not automatically require reversal. Where trial court held a hearing to reconstruct, to the extent possible, the relevant portion of voir dire, the court's denial of the challenge for cause was upheld. *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998).

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. *People v. Prator*, 833 P.2d 819 (Colo. App. 1992).

Court properly denied challenge for cause of a prospective juror because, although the juror stated that she basically believed children to be honest, she also indicated she would apply the principles of law given by the court to their testimony. *People v. Howard*, 886 P.2d 296 (Colo. App. 1994).

Defendant must exercise reasonable diligence to determine whether a prospective juror should have been excused. If defendant fails to do so, he or she is considered to have waived his or her opportunity to raise any matters pertaining to the qualifications and competency of the excluded juror on appeal. *People v. Asberry*, 172 P.3d 927 (Colo. App. 2007).

B. Effect of Juror's Opinion or Interest.

Subparagraph (b)(1)(X) of this rule does not conflict with the sixth amendment to the United States Constitution, which secures to persons charged with crime the right to be tried by an impartial jury. *Jones v. People*, 2 Colo. 351 (1874).

Defendant has right to ask questions to show existence of grounds for challenge. The defendant has a right to propound questions to the proposed jurors, to show not only that there exists proper grounds for a challenge for cause but also to elicit facts to enable him to decide whether or not he would make a peremptory challenge. *Union Pac. Ry. v. Jones*, 21 Colo. 340, 40 P. 891 (1895); *Jones v. People*, 23 Colo. 276, 47 P. 275 (1896); *Zancannelli v. People*, 63 Colo. 252, 165 P. 612 (1917).

The mere expression of some concern by a prospective juror regarding a certain aspect

or issue of a case should not result in automatic dismissal of that prospective juror for cause. Likewise, dismissal for cause is not required merely because a prospective juror answers questions in a way that might indicate some bias, prejudice, or preconceived notion. The decisive question is whether it is possible for the prospective juror to set aside his or her preconceived notions and decide the case based on the evidence and the court's instructions. In determining whether a prospective juror can do so, the trial court should consider all available facts, including the prospective juror's assurances of fairness and impartiality. *People v. Arko*, 159 P.3d 713 (Colo. App. 2006), rev'd on other grounds, 183 P.3d 555 (Colo. 2008).

Challenge for cause should be granted where prospective juror is unwilling or unable to accept the basic principles of law applicable to the case and to render a fair and impartial verdict based upon the trial. *People v. Russo*, 713 P.2d 356 (Colo. 1986); *People v. Esch*, 786 P.2d 462 (Colo. App. 1989).

Juror who is not impartial should be dismissed. If there is sufficient reason to question the impartiality of the juror, the trial court should grant a challenge for cause and dismiss the juror. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980); *People v. Russo*, 677 P.2d 386 (Colo. App. 1983).

To ensure that the right to a fair trial is protected, the trial court must excuse prejudiced or biased persons from the jury. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980); *People v. Gurule*, 628 P.2d 99 (Colo. 1981).

If the trial court has genuine doubt about the juror's ability to be impartial, it should resolve the doubt by sustaining the challenge. *People v. Russo*, 713 P.2d 356 (Colo. 1986).

Or who will not follow court's instructions. A prospective juror should be excused if it appears doubtful that he will be governed by the instructions of the court as to the law of the case. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

And failure to excuse prejudiced juror is abuse of discretion. Where a juror repeatedly indicated that he would have difficulty applying the principles that the burden of proof rests solely upon the prosecution to establish the guilt of the accused, the trial court abused its discretion by failing to excuse him. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

Where the prospective juror patently demonstrates a fixed prejudgment about the merits of the case and an unwillingness to accept and apply those principles that form the bedrock of a fair trial, the trial court errs in refusing to excuse that juror when casually challenged. *People v. Gurule*, 628 P.2d 99 (Colo. 1981).

But denying challenge to juror with bias against handguns not abuse. In a prosecution for armed robbery, the court does not abuse its

discretion in denying a challenge for cause to potential juror who admits his long-standing bias against handguns, where the juror is questioned extensively by the court and defendant's counsel on his opinions concerning handguns and the probable effect of his opinions and experiences on his evaluation of the evidence, where the juror reveals no enmity or bias toward the defendant or the state, and where he expresses an understanding of the principles upon which a fair trial is based. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

General prejudice against crime does not disqualify. Under this rule a general prejudice against crime, or prejudice against the particular crime with which the accused stands charged, does not disqualify a juror. *Smith v. People*, 39 Colo. 202, 88 P. 1072 (1907); *Ausmus v. People*, 47 Colo. 167, 107 P. 204 (1910); *Forte v. People*, 57 Colo. 450, 140 P. 789 (1914); *McGonigal v. People*, 74 Colo. 270, 220 P. 1003 (1923); *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926); *Fleagle v. People*, 87 Colo. 532, 289 P. 1078 (1930).

Nor does a financial interest not directly affected. Where, in a prosecution of bank officers for a conspiracy to defraud the bank, certain jurors, though creditors of the bank or financially interested therein at the time of its failure, testified that they had no bias or prejudice against the defendants, and any interest they might have in the bank's affairs could not be affected in any way by the litigation, they were not disqualified. *Imboden v. People*, 40 Colo. 142, 90 P. 608 (1907).

And fact that jurors have read newspaper articles relating to a case does not disqualify them as jurors. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Even though juror may have preconceived notion as to the guilt or innocence of an accused he may not be automatically disqualified from serving. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

That a person has an opinion or impression concerning the guilt or innocence of the accused which can only be removed by evidence is by no means conclusive of his disqualification to serve as a juror. *Solander v. People*, 2 Colo. 48 (1873); *Union Gold Mining Co. v. Rocky Mt. Nat'l Bank*, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877); *Jones v. People*, 6 Colo. 452, 45 Am. R. 526 (1882); *Denver, S. P. & P. R. v. Driscoll*, 12 Colo. 520, 21 P. 708, 13 Am. St. R. 243 (1889); *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972); *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972); *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

On the theory that news report will not control judgment. As a rule, citizens who are fit to try criminal cases will not allow previous

opinions based upon unofficial reports to control their judgment against the sworn evidence in a case. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Power v. People*, 17 Colo. 178, 28 P. 1121 (1892).

Where the voir dire amply demonstrates the absence of prejudice and the ability of the jurors to set aside any opinions that they may have received from the news media to the end that the case could be determined on the law and on the evidence, reversal is not called for. *Sergeant v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

Where the record contained no evidence that any juror was prejudiced by having read anything in the newspapers, the denial of a challenge for cause was clearly within the trial court's discretion. *People v. McKay*, 191 Colo. 381, 553 P.2d 380 (1976).

The fact that a juror entertains an opinion as to the guilt or innocence of a defendant does not disqualify him, if the court believes that he can and will disregard that opinion and return a verdict based solely upon the evidence. *McGonigal v. People*, 74 Colo. 270, 220 P. 1003 (1923); *Johns v. Shinall*, 103 Colo. 381, 86 P.2d 605 (1939); *Goldsberry v. People*, 149 Colo. 431, 369 P.2d 787 (1962); *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

So long as the court is satisfied, from an examination of the prospective juror or from other evidence, that the juror will render an impartial verdict according to the evidence admitted at trial and the court's instructions of law, the court may permit the juror to serve. *People v. Gurule*, 628 P.2d 99 (Colo. 1981).

The proper test under this rule when a juror states he has "partially" formed an opinion is, can and will the juror render a verdict according to the evidence heard upon the trial impartially and fairly under his oath so to do, regardless of his preconceived opinions. If the juror declares upon his voir dire oath that he can and will so decide, there is no cause for sustaining a challenge on the ground of such previously formed opinion. *Solander v. People*, 2 Colo. 48 (1873); *Jones v. People*, 6 Colo. 452, 45 Am. R. 526 (1882).

General discussions of crime and possible punishments by a prospective juror do not show sufficient bias or prejudice to disqualify him from serving where he clearly states to the court that he has not arrived at any conclusions and that his mind is free and open. *Fleagle v. People*, 87 Colo. 532, 289 P. 1078 (1930); *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

Trial courts have considerable discretion in ruling on challenges for cause, because the trial judge is in the best position to assess the credibility, demeanor, and sincerity of the potential juror's responses, including statements that linguistically may appear to be inconsis-

tent. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Trial court did not abuse its discretion in denying challenge for cause to juror who admitted familiarity with murder case from press accounts, but who stated she would attempt to be fair and impartial despite such knowledge. *People v. Brown*, 731 P.2d 763 (Colo. App. 1986).

Nor did trial court abuse its discretion in denying challenge for cause to juror who admitted that she had read about the case involving felony child abuse that resulted in death and may have formed an opinion about the defendant's affirmative defense. Juror, upon sufficient questioning by the court, said she would listen to the evidence presented and would apply the court's instruction on the law in reaching a verdict. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Test as to whether prospective juror has been unduly affected by pretrial publicity is whether the nature and strength of the opinion formed or of the information learned from that publicity are such as necessarily raise the presumption of partiality or of the inability of the potential juror to block out the information from his consideration. *People v. Romero*, 42 Colo. App. 20, 593 P.2d 365 (1978); *People v. Bashara*, 677 P.2d 1376 (Colo. App. 1983).

Neither the department of social services nor the equal employment opportunity commission constitute a "law enforcement agency", and therefore trial court did not err by refusing defendant's challenge for cause of jurors employed by such entities. *People v. Zurenko*, 833 P.2d 794 (Colo. App. 1991).

Exclusion of unconscious influence of preconceptions cannot be assumed. One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may exclude even the unconscious influence of his preconceptions. *Beeman v. People*, 193 Colo. 337, 565 P.2d 1340 (1977).

Belief that failure to testify indicates guilt does not disqualify. Notwithstanding a juror expressed belief that failure of defendant to testify would be an indication of guilt, where such juror acknowledges a willingness to lay aside any personal belief and follow the law as instructed by the court, a challenge for cause is properly overruled. *Goldsberry v. People*, 149 Colo. 431, 369 P.2d 787 (1962).

Trial court did not abuse its discretion in denying defendant's challenge for cause where defense counsel asked during voir dire whether anyone believed it would be impossible to be fair if defendant did not testify and juror stated that it would and that it might upset her, but not so much as to affect her decision making. The trial court found that the juror

indicated she would do what the court instructed her to do even though she might not like it. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Informing jurors of mandatory sentence for crime not proper purpose for voir dire. The trial court did not err in refusing to allow defense counsel to conduct voir dire for the purpose of informing potential jurors of the mandatory sentence for a crime of violence. *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

Voir dire examination concerning capital punishment. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972); *Segura v. District Court*, 179 Colo. 20, 498 P.2d 926 (1972); *People v. District Court*, 190 Colo. 342, 546 P.2d 1268 (1976).

Knowledge of jurors concerning questions of law not proper subject for voir dire. The knowledge or ignorance of prospective jurors concerning questions of law is generally not a proper subject of inquiry for voir dire, for it is presumed that jurors will be adequately informed as to the applicable law by the instructions of the court. *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

Juror with tenuous relationship with law enforcement agency should be excused. To insure that a jury is impartial in both fact and appearance, a prospective juror who has even a tenuous relationship with any prosecutorial or law enforcement arm of the state should be excused from jury duty in a criminal case. *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978).

Challenge for cause valid. Juror's close association with the law enforcement establishment, the crime scene, and the co-employee who attended the murder victim required dismissal for cause. *People v. Rogers*, 690 P.2d 886 (Colo. App. 1984).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror that had multiple associations with law enforcement. The juror understood that the defense had no burden of proof, that the prosecution had the burden of proving every element, and that both sides would get a fair trial from said juror. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror based on said juror's views regarding the death penalty and previous traumatic experiences. The juror did not express any partiality for or bias in favor of or against either side. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

State penitentiary deemed law enforcement agency. The state penitentiary, as a state "institution" within the department of institutions, is a law enforcement agency for the pur-

poses of determining the eligibility of employees thereof to serve as jurors. *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

Showing of bias not required. Under § 16-10-103 and subsection (b)(XII), the actual bias of a law enforcement employee need not be shown to sustain a challenge for cause. *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978).

But disqualification not applicable to former employees. As § 16-10-103 and this rule do not purport to disqualify former employees of a public law enforcement agency challenged for cause, a defendant's challenge of a retired guard member of the jury panel should be denied. *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

Prospective juror clearly was not an "employee" under subparagraph (b)(1)(XII) of this rule or § 16-10-103 where she volunteered to serve on an on-call basis to work with victims, at the time of trial had been an advocate for a brief period, had been called only approximately six times, and had only a casual limited time commitment. *People v. Gilbert*, 12 P.3d 331 (Colo. App. 2000).

Defendants were not prejudiced by having the wife of the deputy sheriff on jury where voir dire questions revealed that her husband was a police officer, but where she was not asked whether he was a deputy sheriff nor did she disclose the information, because it would have added nothing material to counsel's decision as to whether to challenge for bias. *Ray v. People*, 147 Colo. 587, 364 P.2d 578 (1961).

Noncitizen properly excused from jury. It is proper to excuse from the jury a person who is not a citizen of the United States. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

A county official whose office, by statutory mandate, is represented by the prosecutor need not automatically be excluded from serving on a jury on the grounds that the county official is implicitly biased. The relationship between the offices of the clerk and county recorder and of the district attorney, standing alone, does not provide sufficient grounds to justify a challenge for cause. *People v. Rhodus*, 870 P.2d 470 (Colo. 1994).

C. Public Law Enforcement Agency or Public Defender's Office Employee as Juror.

While § 16-10-103 (1)(k) and subparagraph (b)(1)(XII) of this rule require a trial court to grant a party's challenge for cause to a juror who is employed by a public law enforcement agency, neither expressly requires the court to excuse a juror sua sponte. *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd in part and rev'd in part on other grounds*, 169 P.3d 662 (Colo. 2007).

For purposes of § 16-10-103 (1)(k) or subparagraph (b)(1)(XII) of this rule, the environmental protection agency is properly characterized as an investigatory and rule-making body, and not a law enforcement agency. *People v. Simon*, 100 P.3d 487 (Colo. App. 2004).

Division of youth corrections (DYC) within the department of human services is a public law enforcement agency within the meaning of § 16-10-103 (1)(k) and subparagraph (b)(1)(XII) of this rule. The court erroneously denied defendant's challenge for cause to a prospective juror employed by the DYC. *People v. Sommerfeld*, 214 P.3d 570 (Colo. App. 2009).

An employee of a community corrections facility is an employee of a public law enforcement agency within the meaning of § 16-10-103 (1)(k) and subparagraph (b)(1)(XII) of this rule. *People v. Romero*, 197 P.3d 302 (Colo. App. 2008).

The office of the state attorney general is a law enforcement agency for purposes of § 16-10-103 (1)(k). *People v. Novotny*, ___ P.3d ___ (Colo. App. 2010).

D. Determination of Juror's Fitness.

Court is trier of qualifications of jurors. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

Extent of examination by trial judge. The trial judge may examine prospective jurors on any matter relevant to their competence as jurors. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Court to determine if juror indifferent. This rule makes the trial court the trier of the qualifications of the jurors when challenged on the ground of having formed opinions, and it is for that court to determine, as a matter of fact, whether the juror stands indifferent. *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899); *Solander v. People*, 2 Colo. 48 (1873); *Jones v. People*, 6 Colo. 452, 45 Am. R. 526 (1882); *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Power v. People*, 17 Colo. 178, 28 P. 1121 (1892); *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

While a challenge based upon the interest or bias or prejudice of a juror is somewhat different from that based upon the grounds of having formed an opinion, so far as the determination of his qualifications is concerned, the principle is the same; and as this rule makes the trial court trier of the qualifications of jurors when challenged upon the grounds of having formed opinions, it is for that court to determine as a matter of fact whether the juror stands indifferent. *Imboden v. People*, 40 Colo. 142, 90 P. 608 (1907); *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885); *Babcock v. People*, 13 Colo. 515, 22 P.

817 (1889); *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899).

"Undue hardship" may include financial burden. What constitutes "undue hardship" sufficient to excuse a juror lies within the discretion of the trial court, and includes one for whom jury service would impose an undue financial burden. *People v. Reese*, 670 P.2d 11 (Colo. App. 1983).

Trial judge determines as a fact the fitness of the jurors to hear and determine an issue. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

And appellate court to review trial judge's determination. The placing of discretion in the trial judge in jury selection procedures does not permit appellate courts to abdicate their responsibility to ensure that the requirements of fairness are fulfilled. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

But trial court's determination will not be disturbed on review. Where a trial court is satisfied that a juror can lay aside a previously formed opinion and decide a case upon its evidence, the court's decision will not be disturbed on review. *Fleagle v. People*, 87 Colo. 532, 289 P. 1078 (1930); *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Hillen v. People*, 59 Colo. 280, 149 P. 250 (1915); *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926); *People v. Nunez*, 698 P.2d 1376 (Colo. App. 1984), aff'd, 737 P.2d 422 (Colo. 1987).

The trial court is in the best position to view the demeanor of a juror claiming impartiality, and the record must affirmatively demonstrate that the trial court abused its discretion before its decision can be disturbed on appeal. *People v. Russo*, 713 P.2d 356 (Colo. 1986); *People v. Christopher*, 896 P.2d 876 (Colo. 1995).

A new trial may be required where a juror deliberately misrepresents or knowingly conceals information relevant to a challenge for cause or a preemptory challenge; however, where the juror's nondisclosure was inadvertent, the defendant must show that the nondisclosed fact was such as to create an actual bias either in favor of the prosecution or against the defendant. *People v. Christopher*, 896 P.2d 876 (Colo. 1995).

Absent abuse of discretion. If the trial judge is persuaded that a juror would fairly and impartially try the issues, his denial of a challenge for cause should not be disturbed, except where such denial is clearly an abuse of discretion. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958); *Solander v. People*, 2 Colo. 48 (1873); *Jones v. People*, 2 Colo. 351 (1874); *Jones v. People*, 6 Colo. 452, 45 Am. R. 526 (1882); *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Thompson v. People*, 26 Colo. 496,

59 P. 51 (1899); *McGonigal v. People*, 74 Colo. 270, 220 P. 1003 (1923); *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Since trial judge in best position to observe. While a trial judge hears the questions put to a juror and the answers given, observes a juror's demeanor while being interrogated, and discerns through the use of his eyes, ears, and intelligence wherein truth and credit should be given, a reviewing court does not have the benefit of this personal observation which is so important in judging the credibility of a juror. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

The ultimate decision of whether or not to grant a challenge for cause is one for the trial court's sound discretion, since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980).

The need for a careful evaluation of the competence of potential jurors to assess the defendant's guilt or innocence solely on the evidence admitted at trial, and the serious practical problems involved with these assessments, are sound reasons for placing great discretion in the trial court in the jury selection procedures. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

IV. PEREMPTORY CHALLENGES.

Section 16-10-104 controls over section (d). Peremptory challenges, while not constitutionally required, are deemed to be an effective means of securing a more impartial and better qualified jury and, as such, are an important right of an accused. While also having an incidental effect on trial procedure, § 16-10-104, is primarily an expression of policy concerning this right of the accused, a substantive matter, and, thus, controls over section (d) of this rule. *People v. Hollis*, 670 P.2d 441 (Colo. App. 1983).

Although § 16-10-104 refers to the number of challenges in capital cases, it does not define "capital case". By contrast, subsection (d)(1) of this rule does define the term. The rule and the statute, therefore, do not "conflict" in the sense of being irreconcilable or necessarily incompatible with each other, and the rule can be given effect without producing a result irreconcilable with the plain language of the statute. *People v. Reynolds*, 159 P.3d 684 (Colo. App. 2006).

The time for determining the number of peremptory challenges is the time *voir dire* is commenced. *People v. Hollis*, 670 P.2d 441 (Colo. App. 1983).

Number of peremptory challenges allowed is governed by the statute and rule in effect at

the time *voir dire* is conducted. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

Party has absolute right to use all peremptory challenges granted him by this rule, and any frustration thereof, whether by erroneous ruling, false information, or concealment constitutes reversible error. *Harris v. People*, 113 Colo. 511, 160 P.2d 372 (1945).

And unnecessary use of peremptory challenges not error where not fatal. Where a challenge by the accused to a juror for cause should have been sustained, but the objectionable juror was subsequently peremptorily challenged by defendant, and, at the time of going to trial, defendant had left unused seven peremptory challenges, the error was not fatal to the judgment. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885); *Solander v. People*, 2 Colo. 48 (1873); *Jones v. People*, 2 Colo. 351 (1874).

But error where peremptory challenges exhausted unnecessarily. Where a challenge is properly made, but is overruled by the court, and the challenging party afterwards exhausted his peremptory challenges, using one of them on the disqualified juror, the action of the court in denying the challenge is error to the substantial prejudice of the party who made the challenge. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 P. 680 (1912); *Denver City Tramway Co. v. Kennedy*, 50 Colo. 418, 117 P. 167 (1911); *People v. Maes*, 43 Colo. App. 365, 609 P.2d 1105 (1979); *People v. Russo*, 677 P.2d 386 (Colo. App. 1983).

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. *People v. Prator*, 833 P.2d 819 (Colo. App. 1992).

However, defendant must show exhaustion on appeal. Where defendant claims error in denial of his challenge of a juror for cause who was later excused by peremptory challenge, but makes no showing that all of the peremptory challenges to which defendant was entitled were exercised, nor is it shown that he was deprived of the right to challenge any other prospective juror because he was forced to exhaust his peremptory challenges, even assuming that the court should have sustained the challenge for cause, there can be no prejudice to the rights of the defendant resulting from the denial of such challenge. *Skeels v. People*, 145 Colo. 281, 358 P.2d 605 (1961).

Where the trial court improperly removed jurors for cause and the prosecution subsequently used all of its peremptory challenges, the prosecution enjoyed an unfair tactical advantage in determining the makeup of the jury, detrimentally affecting the rights of the defendant and requiring a new trial. Improper-

erly dismissing some jurors for cause had the effect of granting additional peremptory challenges to the prosecution. It was irrelevant that the defendant had full ability to use his peremptory challenges. The prosecution's relatively greater ability to remove jurors it viewed as objectionable was independently prejudicial to the defendant's rights, and the court presumed prejudice to the defendant. *People v. Lefebvre*, 5 P.3d 295 (Colo. 2000).

Defendant must object to the use of excess peremptory challenges. Right to object to prosecution's use of more than statutorily allowed number of peremptory challenges is waived unless there is timely objection by the defendant. *Righi v. People*, 145 Colo. 457, 359 P.2d 656 (1961).

Judge may grant peremptory challenge of juror after his acceptance. Although there is no provision in section (d), for the trial judge to exercise his discretion, in a proper case the trial judge may properly exercise his discretion, upon a showing of good cause, and grant a peremptory challenge even after the juror has been accepted. *Simms v. People*, 174 Colo. 85, 482 P.2d 974 (1971).

Subsection (d)(3) of this rule allows the court to add peremptory challenges to either or both sides, but does not require the court to do so. *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Applicability of right of 10 peremptory challenges to adjudicative stage of a juvenile proceeding. *People in Interest of T.A.W.*, 38 Colo. App. 175, 556 P.2d 1225 (1976).

V. CUSTODY OF JURY.

This rule implements traditional practice of trial courts in this state. *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

Colorado permits the separation of jurors even in capital cases where assented to by the attorneys for the parties, although the supreme court has expressed its disapproval of the practice in serious criminal cases. *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

But rule requires sequestration of jurors in first-degree murder case unless requirement waived by the accused. *Tribe v. District Court*, 197 Colo. 433, 593 P.2d 1369 (1979); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

Defendant's personal assent as opposed to counsel's alone is not mandatory for such waiver in capital cases. *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

Showing of prejudice necessary for error where counsel agrees to separation. Where defense counsel expressly agrees to separation of the jury in a capital case, error cannot be predicated on that procedure in the absence of a

showing of prejudice to the defendant. *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

And, in such a case, the defendant has burden of proof. *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966).

Burden of showing prejudice from separation of a deliberating jury in a noncapital case also rests upon the defendant. *People v. Maestas*, 187 Colo. 107, 528 P.2d 916 (1974).

And absent a showing of prejudice, separation is not grounds for reversal. *People v. Maestas*, 187 Colo. 107, 528 P.2d 916 (1974).

Determination of whether prejudice has occurred during jury sequestration is within the sound discretion of the trial court and only where that discretion has been abused will a new trial be ordered. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Trial of a first-degree murder charge is a "capital case" for purposes of jury sequestration under section (f), even though the district attorney does not intend to qualify the jury for consideration of the death penalty or to seek the imposition of the death penalty in the event of a conviction. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983) (decided prior to 1983 amendment of this rule); *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), aff'd in part and rev'd in part on other grounds, 711 P.2d 1270 (Colo. 1986).

While the rule does not expressly forbid a trial court from allowing jurors to predeliberate, those juror discussions are not allowed in criminal cases in Colorado. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

VI. ALTERNATE JURORS.

Alternate jurors must be discharged at the time the jury retires to deliberate; any replacement of a regular juror by an alternate must occur prior to such time. *People v. Burnette*, 753 P.2d 773 (Colo. App. 1987), aff'd, 775 P.2d 583 (Colo. 1989) (decided prior to 1993 amendment).

Section 16-10-105 controls over section (e) of this rule because the statute provides substantive, in addition to procedural, direction to the trial court. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Trial court has the authority under both § 16-10-105 and section (e) of this rule to replace a juror with an alternate after jury deliberations have commenced. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

If a trial court interrupts deliberations of a jury and suspends the jury's fact finding functions to investigate allegations of juror misconduct, the court's inquiry must not intrude into the deliberative process. In the exercise of judicial discretion, before a juror is dismissed from a deliberating jury due to an allegation of juror misconduct, the court must

make findings supporting a conclusion that the allegedly offending juror will not follow the court's instructions. *Garcia v. People*, 997 P.2d 1 (Colo. 2000).

Prejudice is presumed when alternate juror replaces regular juror during deliberations. *People v. Burnette*, 775 P.2d 583 (Colo. 1989); *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Presence of alternate juror during jury's deliberations sufficiently impinges upon defendant's constitutional right to a jury that renders its verdict in secret as to create a presumption of prejudice that requires reversal if not rebutted, and, where it is unclear from the record whether the alternate juror was actually present during the jury deliberations, the issue should be remanded for an evidentiary hearing. *People v. Boulies*, 690 P.2d 1253 (Colo. 1984).

Presumption of prejudice held sufficiently rebutted where juror was replaced for an obvious and bona fide hearing impairment, court carefully instructed remaining jurors and the alternate juror to start their deliberations anew, the jury physically tore up and discarded their notes from the earlier deliberations, and the second set of deliberations took two hours longer than the first. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Presumption of prejudice may be rebutted only by a showing that trial court took extraordinary precautions to ensure that defendant would not be prejudiced and that, under the circumstances of the case, such precautions were adequate to achieve that result. *People v. Burnette*, 775 P.2d 583 (Colo. 1989).

Procedures instituted by the trial court did not meet the *People v. Burnette* standard. *People v. Patterson*, 832 P.2d 1083 (Colo. App. 1992).

Reversible error. Where trial court replaced regular juror with alternate juror during jury deliberations but did not ask regular jurors if they were capable of disregarding their previous

deliberations or if they would be receptive to an alternate juror's attempt to assert a non-conforming view and did not ask alternate juror about his activities after being discharged or his present ability to serve on the jury, trial court did not take extraordinary measures to ensure that defendant would not be prejudiced by such mid-deliberation replacement and, as a result thereof, defendant's conviction required reversal. *People v. Burnette*, 753 P.2d 773 (Colo. App. 1987), *aff'd*, 775 P.2d 583 (Colo. 1989).

Absent a showing of prejudice, a defendant's failure to timely object to the separation of the jury during a trial constitutes a waiver of sequestration. *Jones v. People*, 711 P.2d 1270 (Colo. 1986).

Defendant did not waive right to challenge the procedure followed in accomplishing substitution of juror by consenting to the fact of substitution. *People v. Patterson*, 832 P.2d 1083 (Colo. App. 1992).

Applied in *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986).

VII. JUROR QUESTIONS.

Juror questioning in a criminal trial does not, in and of itself, violate a defendant's constitutional rights to a fair and impartial jury. *Medina v. People*, 114 P.3d 845 (Colo. 2005).

Where the court errs by asking an improper question from the jury, the impact of the question should be reviewed for harmless error. *Medina v. People*, 114 P.3d 845 (Colo. 2005).

Trial court did not commit reversible error by posing jury's questions to witnesses without first consulting defense counsel. When an improper question from the jury is asked of a witness, the proper course is not to apply structural error but to review the impact of the trial court's ruling for harmless error. *People v. Zamarippa-Diaz*, 187 P.3d 1120 (Colo. App. 2008).

Rule 25. Disability of Judge

If by reason of absence from the district, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties. If the substitute judge is satisfied that he cannot perform those duties because he did not preside at the trial, or for any other reason, he may, in his discretion, grant a new trial.

ANNOTATION

Substitution of judges is permitted so long as a justifiable reason for the substitution appears in the record. Substitution need not be required by an emergency or other situation beyond the control of the original judge to be

justifiable. *People v. Little*, 813 P.2d 816 (Colo. App. 1991).

Where the reason for substituting judges does not appear in the record, the case must be remanded for statement of the reason. The

sentence will only be affirmed thereafter if the reason is one specified in the rule. If the reason is not one of those specified in the rule, the sentence will be vacated and the defendant will be resentenced by the original judge. *People v. Little*, 813 P.2d 816 (Colo. App. 1991).

Case remanded to trial court for the judge who tried the case to explain on the record why he recused himself before sentencing. *People v. Brewster*, 240 P.3d 291 (Colo. App. 2009).

Rule does not apply where conviction was the result of a guilty plea and not a trial and because a revocation hearing on a deferred judgment is not a trial. *People v. Rivera-Bottzeck*, 119 P.3d 546 (Colo. App. 2004).

The requirement that the same judge impose sentence after a trial, except for justifiable reasons to substitute another judge, does not apply to resentencing proceedings. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

Rule 26. Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by law.

Source: Entire rule amended and adopted November 9, 2006, effective January 1, 2007.

ANNOTATION

- I. General Consideration.
- II. Function of Judge and Jury.
- III. Witnesses.
 - A. Testimony.
 - B. Corroboration.
- IV. Admissibility.
 - A. In General.
 - B. Confessions and Admissions.
 - C. Exclusionary Rule.
 - D. In-Court Identification.
 - E. Codefendants.
 - F. Circumstantial.
 - G. Documentary.
 - H. Exhibits.
- V. On Review.

I. GENERAL CONSIDERATION.

Law reviews. For comment, "Reporter's Privilege: *Pankratz v. District Court*", see 58 Den. L.J. 681 (1981). For article, "Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality", see 11 Colo. Law. 704 (1982). For article, "*People v. Mitchell*: The Good Faith Exception in Colorado", see 62 Den. U. L. Rev. 841 (1985).

Opening statements and arguments of lawyers are not evidence. *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972).

Such arguments are designed only to sway findings. Arguments to the court are not matters of evidence, have no probative value, and are designed only to sway the court's findings and conclusions. *People In Interest of B. L. M. v. B. L. M.*, 31 Colo. App. 106, 500 P.2d 146 (1972).

II. FUNCTION OF JUDGE AND JURY.

Order of proof and presentation of witnesses is within sound discretion of the trial court, and error may not be predicated thereon in the absence of a showing of prejudice. *Mar-*

inez v. People, 177 Colo. 272, 493 P.2d 1350 (1972).

Allowing prosecution to recall witnesses for further cross-examination after defense rests its case is matter pertaining to proof and is within sound discretion of trial judge. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

Jury is permitted to draw any and all reasonable inferences of guilt from the evidence before it. *Huser v. People*, 178 Colo. 300, 496 P.2d 1035 (1972).

Effect of waiving jury trial. Where the defendant voluntarily waived a jury trial, the trial judge had no recourse but to examine the evidence and rule on its admissibility, and the defendant cannot be heard to complain, when he voluntarily, and with advice of counsel, created a situation which by necessity made the trial judge both the one who decides if evidence is admissible and the one who renders the verdict. *People v. Mascarenas*, 181 Colo. 268, 509 P.2d 303 (1973).

The credibility of witnesses, including experts, is within the province of the jury as the fact finder and the jury's obvious acceptance of the testimony by the prosecution's experts is not subject to reversal. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

III. WITNESSES.

A. Testimony.

It is axiomatic that witnesses should relate facts and not conclusions. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

But exception when witness must summarize impressions of senses. An exception to the rule that a witness may only relate facts exists when a witness has personally observed the physical activity of another and summarizes his sensory impressions thereof because they can

hardly be described in any other manner. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Especially where witness qualifies conclusionary statement. Where a witness qualifies his conclusion immediately subsequent to defendant's objection by stating that defendant "looked like" he was going to do a certain act, the trial court commits no error in overruling defendant's objection to such testimony. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Admission of unresponsive testimony not per se wrong. There is nothing per se wrong with the admission into evidence of testimony which may be unresponsive, provided that it is relevant for some purpose. *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973).

Testimony as to possible places of incarceration is not to be placed before a jury. *People v. Scheidt*, 186 Colo. 142, 526 P.2d 300 (1974).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. Defense counsel raised self-defense as an affirmative defense during opening statements and elicited testimony to support the affirmative defense during cross examination of a prosecution witness. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

B. Corroboration.

Defendant may be convicted upon uncorroborated testimony of accomplice. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

Corroborating evidence defined. Corroborating evidence is evidence, either directly or by proof of surrounding facts and circumstances, that tends to establish the participation of the defendant in the commission of the offense. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

IV. ADMISSIBILITY.

A. In General.

Trial court did not err by admitting gun where there was conflicting testimony concerning the gun's origin since the lack of a positive identification of the gun affected the weight to be given the evidence, not the admissibility. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

All facts proving crime charged admissible. All the facts which are necessary to prove the crime charged, when linked to the chain of events which supports that crime, are admissible. *People v. Anderson*, 184 Colo. 32, 518 P.2d 828 (1974).

Weakness in chain of evidence addresses weight of evidence. Where the chain of evidence is complete, any weakness in the chain

goes merely to the weight of the evidence and not to its admissibility. *People v. Sanchez*, 184 Colo. 25, 518 P.2d 818 (1974).

Admission of cumulative evidence is within the discretion of the trial court and its ruling will not be overturned unless a clear abuse of discretion appears. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

On rebuttal, party may introduce any competent evidence to explain, refute, counteract, or disprove proof of other party, even if evidence also tends to support the party's case in chief. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973); *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

Propriety of permitting surrebuttal evidence is within discretion of trial court. *People v. Hutto*, 181 Colo. 279, 509 P.2d 298 (1973).

Where defendant seeks to discuss on surrebuttal matters that are not a reply to new evidence of prosecution, but have been specifically covered in earlier testimony, the trial court does not commit an abuse of discretion in denying defendant's request. *People v. Martinez*, 181 Colo. 27, 506 P.2d 744 (1973).

Except where defendant meeting matter introduced by prosecution on rebuttal. Defendants should always be permitted to introduce, as surrebuttal, evidence which tends to meet any new matter introduced by prosecution on rebuttal; otherwise, it is within discretion of trial court to allow or deny surrebuttal. *People v. Martinez*, 181 Colo. 27, 506 P.2d 744 (1973).

When error in admission of evidence not curable by instructions to jury. Error in admitting evidence may be cured by instructing the jury to disregard it, unless such evidence is so prejudicial that it is unlikely that the jury will be able to erase it from their minds; if it is so prejudicial, a mistrial should be ordered. *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971).

An error in exposing to the jury certain inadmissible evidence may be cured by instructing the jury to disregard it; however, when such evidence is highly prejudicial, it is conceivable that, but for its exposure, the jury may not have found the defendant guilty, and the trial court's cautionary instruction to disregard it will not suffice. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

Remarks by judge may not constitute reversible error. Casual remarks of the trial judge, made while passing upon objections to testimony, although ill-advised, do not constitute reversible error when not so couched as to especially reflect upon defendant. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

Nor correct comments by district attorney on evidence. Where the record shows beyond a doubt that the testimony implicated the companions of defendant as accomplices, any state-

ment by the district attorney with regard to those persons as accomplices, after such a showing, is within the boundaries of proper comment. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Trial court's curative instruction, which directed jurors not to consider evidence relating to other transactions allegedly involving defendant, cured any errors resulting from admission of such evidence in "theft by receiving" prosecution where evidence of defendant's "theft by receiving" was overwhelming. *Vigil v. People*, 731 P.2d 713 (Colo. 1987).

B. Confessions and Admissions.

Admissibility of defendant's statement to be determined at trial. Where a defendant is given a full "Miranda" warning following his arrest, the admissibility of the statements he made as evidence must be determined by the court at the time of trial rather than on interlocutory appeal under Rule 41.2, Crim. P. *People v. Vaughns*, 175 Colo. 369, 489 P.2d 591 (1971).

Outside presence of jury. The trial court must make a determination of the admissibility of a confession, which entails a determination of the propriety of the "Miranda" warning, outside of the presence of the jury, at an in camera hearing. *Perez v. people*, 176 Colo. 505, 491 P.2d 969 (1971).

Including issue of voluntariness. Whenever voluntariness in an issue in a trial, there must be a hearing before the trial judge and a determination made on that issue. *People v. Sanchez*, 180 Colo. 119, 503 P.2d 619 (1972).

As to be admissible, confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight. *People v. Pineda*, 182 Colo. 385, 513 P.2d 452 (1973).

Where the defendant makes a voluntary, knowing, and intelligent waiver of his constitutional rights, the trial court's ruling that an oral statement of the defendant is admissible is not error. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972).

Two-step procedure is proper to resolve issue of voluntariness of confession: First, the trial judge must determine whether the confession is voluntary; and, second, if the confession is voluntary and is admitted into evidence, the trial judge should instruct the jury on the weight to be given the confession. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

Admissibility need only be established by preponderance of evidence. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

A trial judge only has to find that a defendant's statement is voluntary by a preponderance of the evidence to justify submission of the

statement to the jury. *People v. Smith*, 179 Colo. 413, 500 P.2d 1177 (1972).

Although waiver of rights must be found beyond a reasonable doubt. Before a criminal defendant's extrajudicial statement is admissible as evidence against him, a trial court must find beyond a reasonable doubt that the defendant was fully informed of his constitutional rights and that he intelligently and expressly waived them. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971).

And the burden is upon the state to show attendant circumstances sufficient from which a knowing and intelligent waiver may be implied. *Roybal v. People*, 178 Colo. 259, 496 P.2d 1019 (1972).

Or testimony inadmissible. Where the state does not meet its burden of showing by clear and convincing evidence that defendant was represented by counsel at a lineup, lineup testimony is properly excluded. *Fresquez v. People*, 178 Colo. 220, 497 P.2d 1246 (1972).

Total circumstances and conduct of accused must be considered. In passing on whether a statement is voluntary and whether the accused waived his rights, the court must consider and examine the totality of the facts and circumstances of the case, as well as the conduct of the accused. *Duncan v. People*, 178 Colo. 314, 497 P.2d 1029 (1972).

Findings must be supported by evidence. Where the findings of the court entered after an in camera hearing are that the statements were understandingly and voluntarily given, that defendant at the time had full knowledge of his rights, and the findings are supported by the evidence, it is not error to admit defendant's statements with evidence. *People v. Gallegos*, 180 Colo. 238, 504 P.2d 343 (1972).

Appellate review. An appellate court is bound to accept the trial court's findings and ruling on the admissibility of a confession, if the evidence is sufficient to support the trial court's determination. *Redmond v. People*, 180 Colo. 24, 501 P.2d 1051 (1972).

Where trial court's finding that accused's confession was voluntary and admissible is supported by competent evidence, it will not be disturbed on appeal. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

Trial court's findings of facts on the voluntariness of a confession will be upheld on review if supported by adequate evidence in the record. *People v. Pineda*, 182 Colo. 385, 513 P.2d 452 (1973); *People v. McIntyre*, 789 P.2d 1108 (Colo. 1990).

Evidence held sufficient to show intelligent waiver of rights. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972); *McClain v. People*, 178 Colo. 103, 495 P.2d 542 (1972).

Prior refusal does not make subsequent voluntary statement inadmissible. When the police fully honor a defendant's refusal to make

a statement, the fact of a prior refusal to make any statement should not taint a statement subsequently given voluntarily and with full advisement of rights. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972).

When Miranda warning not necessary. Where defendant is not in custody nor deprived of his freedom when a police officer asks a question and the investigation has not focused upon any individual, then the Miranda warning is not necessary, since the defendant is not in custody, and no error is committed in admitting a statement into evidence. *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971).

Effect of intoxication on admissibility of statement. See *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Police testimony as to defendant's oral confession was proper and permissible in all its aspects, where the record indicates that before being questioned the defendant was advised of her complete rights; that she read and signed a rights advisement form; that she understood her rights; that she indicated a willingness to talk; and that she freely and voluntarily told the police about her involvement in the crime. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

Admonition to jury does not cure erroneous admission of incriminating statements. An admonition or an instruction to the jury to disregard involuntary incriminating statements does not cure the erroneous admission of such statements. *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971).

Entire statement is admissible if any portion thereof is admissible. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

But burden of showing continuity or relevance in series of statements, or among various parts of a single statement, is on the party seeking to have the entire series or statement admitted. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

Consequently, admission of only the relevant portions of a statement is not error where there is no showing of continuity or relevance between the admitted portions of the statement and the remainder of the statement. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

Moreover, when the trial court admits into evidence a duplicate copy in addition to the original copy of a formal statement, which has been likewise corrected and signed by the defendant, the evidence is merely cumulative, and there is no abuse of discretion in its admission. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

Independent proof of corpus delicti required. An accused's extra-judicial confession or statement is not sufficient to sustain a conviction without proof of the corpus delicti inde-

pendent of the statement or confession. *People v. Maestas*, 181 Colo. 180, 508 P.2d 782 (1973); *People v. Applegate*, 181 Colo. 339, 509 P.2d 1238 (1973); *People v. Smith*, 182 Colo. 31, 510 P.2d 893 (1973).

Use of evidence from uncounseled witness against third party. No reason exists for exclusion of evidence obtained from an uncounseled witness, so long as the evidence obtained is not offered against that witness. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

When reference to defendant's silence is reversible error. Not every reference to defendant's exercise of his fifth amendment right to remain silent mandates automatic reversal; the relevant inquiry is whether the prosecution "utilized defendant's silence as a means of creating an inference of guilt". *People v. Key*, 185 Colo. 72, 522 P.2d 719 (1974); *People v. Benevidez*, 679 P.2d 125 (Colo. App. 1984).

Defendant's statement held to be voluntary when given in a hospital five hours after a serious accident when he was alert, resting, and not under the effects of medication. Defendant willingly participated, no threats were made to secure his cooperation. *People v. Miller*, 829 P.2d 443 (Colo. App. 1991).

Defendant was not in custody when he was in the hospital for medical treatment. Confinement to a hospital bed is insufficient alone to constitute custody. *People v. Miller*, 829 P.2d 443 (Colo. App. 1991).

There was a valid waiver of defendant's Miranda rights when the defendant nodded his head in response to an officer's question concerning whether he understood his rights. A valid waiver need not be express, but may be inferred from actions and words. *People v. Miller*, 829 P.2d 443 (Colo. App. 1991).

Defendant was not in custody when she was in the hospital even though she had been given morphine prior to her making certain incriminating statements. Expert testimony indicated that the morphine she had been given would not have affected her ability to think, speak, and understand the situation. *People v. DeBoer*, 829 P.2d 447 (Colo. App. 1991).

C. Exclusionary Rule.

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., part 3 of article 3 of title 16, and Crim. P. 41.

Exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during, or as the direct result of, an unlawful invasion of a defendant's rights by the police. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971).

Applicability of "fruit of the poisonous tree" doctrine. To apply the "fruit of the poisonous tree" doctrine, the fruit of the search

must have been obtained as the direct result of a violation of the defendant's constitutional rights — such a violation is said to taint the tree and, in turn, the fruit. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971); *People v. Potter*, 176 Colo. 510, 491 P.2d 974 (1971).

Standing to object to illegal seizure. A person who is only aggrieved by the admission of evidence illegally seized from a third person lacks standing to object. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Test of admissibility of evidence seized in lawful search following an unlawful search is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been arrived at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. *People v. Hannah*, 183 Colo. 9, 514 P.2d 320 (1973).

Defendant's allegedly criminal acts were sufficiently attenuated from any illegal conduct of sheriff's deputies so that exclusion of evidence was not appropriate. Evidence of a new crime committed in response to an unlawful trespass is admissible. *People v. Doke*, 171 P.3d 237 (Colo. 2007).

Information in sheriff deputy's affidavit, when considered separately and as a whole, failed to establish a substantial basis for the magistrate's determination that probable cause existed to issue the warrant. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Deputy who conducted the search and who was the same officer who prepared the deficient affidavit either knew or should have known that the warrant he obtained based on his own affidavit was lacking in probable cause, and thus it was objectively unreasonable for him to rely on it. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Trial court erred when it concluded that (1) probable cause existed to issue the search warrant, and, (2) even absent probable cause, the officers acted in good faith in executing the warrant. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

D. In-Court Identification.

Admissibility of in-court identification after illegal lineup. Where evidence is presented showing that an in-court identification of the defendant has an independent origin other than an illegal lineup and the trial court so finds, the in-court identification is admissible. *People v. Bowen*, 176 Colo. 302, 490 P.2d 295 (1971).

Determination of independent basis at "in camera hearing". A trial judge's determination at an "in camera hearing" that an independent basis exists for in-court identification of defendant provides a proper foundation for admission of identification testimony before the jury. *People v. Marion*, 182 Colo. 435, 514 P.2d 327 (1973).

And reviewing court will not substitute its judgment. Where trial judge, after considering the totality of the circumstances at an "in camera hearing", permits the introduction of identification testimony, he does not abuse his discretion, and reviewing court will not substitute its judgment for that of the trial court. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Burden of proof is on prosecution. Where there is a violative lineup identification of a defendant, the burden of proof is on the prosecution to show an untainted identification of the defendant at trial. *People v. Bowen*, 176 Colo. 302, 490 P.2d 295 (1971).

Clear and convincing evidence required that identification from witness' own recollection. It is the burden of the prosecution to show by clear and convincing evidence that any suggestion was not present and that the identification of the defendant is the product of the witness's own recollection. *Constantine v. People*, 178 Colo. 16, 495 P.2d 208 (1972); *Sandoval v. People*, 180 Colo. 180, 503 P.2d 1020 (1972).

Suggestive circumstances do not necessitate reversal. Suggestive circumstances at an out-court identification will not by themselves necessitate reversal of a conviction. The concern of court is to prevent extrajudicial identification so unduly suggestive that, as matter of law, it results in substantial likelihood of mistaken in-court identification. *People v. Pacheco*, 180 Colo. 39, 502 P.2d 70 (1972).

Nor merely cumulative identification. Even if extrajudicial identifications were inadmissible hearsay, where, in light of the other material evidence relating defendants to the crime, such identification is clearly cumulative and any error harmless. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Behavior of witness at confrontation with defendant bears on credibility of the witness's identification of the defendant at the trial. *People v. Bugarin*, 181 Colo. 57, 507 P.2d 879 (1973).

Independent in-court identification of defendant held sufficient to admit into evidence. *McGregor v. People* 176 Colo. 309, 490 P.2d 287 (1971).

E. Codefendants.

Testimony of accomplice must be scrutinized and acted upon with great caution. *People v. Gomez*, 189 Colo. 91, 537 P.2d 297 (1975).

Evidence admissible in separate trial also admissible in joint trial. Where evidence would be admissible against defendant in a separate trial, there is no prejudice as a result of the

admission of that evidence in a joint trial. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

And evidence inadmissible in separate trial admissible in joint trial with limiting instruction. It is not reversible error to admit a statement into evidence which would not be admissible against one of the defendants in a separate trial where the court gives a limiting instruction and the evidence of that defendant's involvement is overwhelming, even though it would be better trial procedure not to admit the statement. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Articles in possession of codefendant may be admitted. Where defendant and his codefendant jointly participated in the criminal venture, they acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice; hence, admitting in evidence as against defendant, the articles found in the possession of his codefendant is not error where they were a part of the state's case against both defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685, cert. denied, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 75 (1960).

Codefendant cannot object to evidence of the history of the joint undertaking, even though it involves the commission of a crime by one or more of the other codefendants, if the history of the enterprise might throw light on the motive he or his codefendants might have had for committing another crime and which history constitutes a chain of circumstances throwing some light on the probability of their having jointly undertaken to commit the crime charged. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Examination of coconspirator concerning guilty plea arising out of same events. *People v. Craig*, 179 Colo. 115, 498 P.2d 942, cert. denied, 409 U.S. 1077, 93 S. Ct. 690, 34 L. Ed. 2d 666 (1972).

F. Circumstantial.

Circumstantial evidence is not relegated to secondary status but is to be considered under the same criteria as direct evidence. *People v. Durbin*, 187 Colo. 230, 529 P.2d 630 (1974).

Conviction of crime may be based upon circumstantial evidence. *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

Circumstantial evidence, when viewed in the light most favorable to the prosecution, can provide proof of guilt beyond a reasonable doubt. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

And quantum of proof required same as for direct evidence. The quantum of proof where guilt is founded upon circumstantial evidence is the same as where it is based on direct evidence. *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

So that evidence not compatible with hypothesis of innocence. Where a conviction is sought on circumstantial evidence alone, the prosecution must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, but the facts and circumstances must be such as are incompatible, upon any reasonable hypothesis, with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant. *People v. Calise*, 179 Colo. 162, 498 P.2d 1154 (1972).

In a circumstantial evidence case, the evidence must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence. *Roybal v. People*, 178 Colo. 259, 496 P.2d 1019 (1972); *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972); *People v. Larsen*, 180 Colo. 140, 503 P.2d 343 (1972).

And exclusion of every possible theory other than guilt is not required, when referring to the sufficiency of circumstantial evidence. *People v. Florez*, 179 Colo. 176, 498 P.2d 1162 (1972).

Test is exclusion of every rational hypothesis, which means reasonable hypothesis. *People v. Florez*, 179 Colo. 176, 498 P.2d 1162 (1972).

Where sufficient question is raised by circumstantial evidence, the finding of the jury is conclusive. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Specific intent proved by circumstantial evidence. Specific intent is ordinarily inferable from the facts, and proof thereof is necessarily by circumstantial evidence. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Circumstantial evidence held sufficient to justify inference of criminal intent. *Evans v. People*, 175 Colo. 269, 486 P.2d 1062 (1971).

Fingerprint evidence may in some instances be sufficient to support conviction where that evidence is tied directly to the commission of the crime and no explanation other than guilt exists. *Solis v. People*, 175 Colo. 127, 485 P.2d 903 (1971).

Fingerprints warrant a conviction when the fingerprints clearly and unequivocally establish that the accused committed the crime. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

G. Documentary.

Use of photographs. Photographs may be used to graphically portray the appearance and condition of a deceased and the extent of existing wounds and injuries and are competent evidence of any relevant matters which a witness may describe in words. *Gass v. People*, 177 Colo. 232, 493 P.2d 654 (1972).

Photographs may be used to graphically portray, among other things, the scene of a crime, the identification of a victim, the appearance

and condition of the deceased, and the location, nature, and extent of the wounds or injuries, all of which matters are relevant. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Photographs are competent evidence of any relevant matter which is competent for a witness to describe in words. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Test for admissibility of photographs rests on whether the probative value of the photographs is "far outweighed" by their potential inflammatory effect on the jury. *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980).

Test for admissibility applied in *People v. Franklin*, 683 P.2d 775 (Colo. 1984); *People v. Marquiz*, 685 P.2d 242 (Colo. App. 1984), *aff'd*, 726 P.2d 1105 (Colo. 1986).

Not inadmissible because of shocking content. That shocking details of a crime may be revealed by photographs does not render them inadmissible if they are otherwise relevant. *Gass v. People*, 177 Colo. 232, 493 P.2d 654 (1972); *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Rather, admissibility discretionary with trial court. The trial court has discretion to determine whether a photographic exhibit is unnecessarily gruesome and inflammatory. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Decision not disturbed absent abuse. Unless an abuse of discretion is shown, a trial court's decision as to admissibility of a photograph will not be disturbed on review. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Standard for review of admission of pictures into evidence is whether they were without probative value and they served only to incite the jurors to passion, prejudice, vengeance, hatred, disgust, nausea, revolt, and all of the human emotions that are supposed to be omitted from the jury's deliberations. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Photographs which should not be used. Photographs such as mug shots which necessarily import prior criminality to the defendant should not be used as evidence at trial. *People v. Bugarin*, 181 Colo. 57, 507 P.2d 879 (1973).

Although no prejudice in use of mugshot of confederate. Mugshot of defendant's confederate, used by the district attorney for identification purposes, where codefendant was tried separately and the mugshot was taken as a result of the charges in the present case, did not import prior criminal conduct on the defendant's part; no prejudice to defendant resulted by the use of the photograph of his confederate and codefendant for identification purposes in defendant's trial. *People v. York*, 189 Colo. 16, 537 P.2d 294 (1975).

Pretrial photographic identification. Where the pretrial photographic identification was not, as a matter of law, tainted with impermissible suggestiveness, it is not incumbent upon the

prosecution to establish at trial an independent basis for the in-court identification. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

Out-of-court identification by photographic array held unduly suggestive. *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

Waiver of error regarding admission of photographs. Where no question as to the admission of a photographic exhibit has been raised on appeal, any error has been waived. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Weight to be given fingerprint evidence for trier of fact. Where a proper foundation was laid for the admission of a fingerprint, the weight to be afforded the fingerprint evidence was for the trier of the fact. *People v. Gomez*, 189 Colo. 191, 537 P.2d 297 (1975).

Generally, old fingerprint card inadmissible. In the usual case, where other sample prints are available, a fingerprint card made in connection with prior criminal activity should not be admitted because of the danger of disclosing a past criminal record. *Serratore v. People*, 178 Colo. 341, 497 P.2d 1018 (1972).

Admissibility of tape recording in discretion of trial court. The decision as to the admissibility of a tape recording is one that rests in the sound discretion of the trial court. *People v. Quintana*, 189 Colo. 330, 540 P.2d 1097 (1975).

H. Exhibits.

Use of exhibits from earlier trial not prejudicial. Fact that certain exhibits used in defendant's trial had court reporter's identification marks on them remaining from their use in the codefendant's trial did not result in any prejudice, and at most, the marks constituted harmless error which is not ground for reversal. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

Exhibits of doubtful admissibility to be kept from view of jury. Matters of evidence which are of doubtful admissibility should not be placed on counsel's table where they may readily be seen by a trial jury. *Zamora v. People*, 175 Colo. 340, 487 P.2d 1116 (1971).

Proper admission of exhibits presumed where not certified as part of appellate record. Where appellate court is unable to appraise the alleged prejudicial effect of exhibits because none are certified as a part of the record on review, the reviewing court may presume that the trial court did not abuse its discretion in admitting them into evidence. *Gass v. People*, 177 Colo. 232, 493 P.2d 654 (1972).

Reconstructed scene inadmissible where accuracy disputed. Where an exhibit has been arranged simply to portray a scene and thereby support testimonial contentions, and when other witnesses dispute the accuracy or correctness of

the reconstructed scene, trial court should not admit the evidence. *People v. Wright*, 182 Colo. 87, 511 P.2d 460 (1973).

V. ON REVIEW.

Waiver of right to appeal admission of testimony. Where defendant does not move the trial court to strike testimony complained of, such is a waiver of his right to appeal. *Larkin v. People*, 177 Colo. 156, 493 P.2d 1 (1972).

Absent serious prejudicial error. Where contemporaneous objection to the admission of evidence on the grounds offered for reversal is not made, then, absent serious prejudicial error, the court will not review the issue. *Duncan v. People*, 178 Colo. 314, 497 P.2d 1029 (1972).

Lack of contemporaneous objection at trial constitutes waiver of objections to admission of evidence, and such issues may not be raised on appeal; if they are, they will not be considered unless errors are so fundamental as to seriously prejudice basic rights of defendant. *Larkin v. People*, 177 Colo. 156, 493 P.2d 1 (1972); *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972).

On review, evidence is viewed in light most favorable to the jury's verdict. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

On the issue of sufficiency of the evidence to sustain a jury's verdict, the evidence, which includes all reasonable inferences which may be drawn therefrom, must be viewed in the light which most favors the jury's verdict. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Reviewing court is required to view the evidence in the light most supportive of the jury's verdict, for purposes of appeal. *People v. Eades*, 187 Colo. 74, 528 P.2d 382 (1974).

Where there is an overwhelming amount of evidence in the record that supports the jury's verdict, that verdict cannot be set aside on review. *People v. Barker*, 189 Colo. 148, 538 P.2d 109 (1975).

Because the jury is presumed to have adopted that evidence which supports its verdict. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Reversal not to be predicated on admission of own evidence. A defendant cannot predicate reversible error on the admission of evidence he offered as a part of his defense. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Appellate court will not review weight of evidence jury found sufficient. Where the jury has found the guilt of an accused to have been proven beyond a reasonable doubt, a court on review will not weigh the evidence. *Schermerhorn v. People*, 175 Colo. 256, 486 P.2d 428 (1971).

A reviewing court cannot invade the province of the jury by making a redetermination on conflicting evidence. *People v. Elliston*, 181 Colo. 118, 508 P.2d 379 (1973).

The supreme court will not substitute its judgment for that of the jury in resolving conflicts in the evidence. *People v. Saavedra*, 184 Colo. 90, 518 P.2d 283 (1974); *People v. O'Donnell*, 184 Colo. 434, 521 P.2d 771 (1974).

Nor reassess credibility of witnesses. The supreme court will not substitute its judgment for that of the jury in assessing the credibility of witnesses. *People v. Saavedra*, 184 Colo. 90, 518 P.2d 283 (1974); *People v. O'Donnell*, 184 Colo. 434, 521 P.2d 771 (1974).

Appellate court must look at evidence in state's favor after conviction. Where the evidence was conflicting in many particulars, the court on appeal must look at it in the light most favorable to the state in determining whether there is substantial evidence to support the verdict against defendant. *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972).

When reviewing the sufficiency of the evidence to sustain a conviction, it must be examined in the light most favorable to the prosecution. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Evidence sufficient to sustain judgment. *Martin v. People*, 178 Colo. 94, 495 P.2d 537 (1972).

For reversal, questionable evidence must substantially influence verdict. To constitute reversible error, the questionable evidence must have had a substantial influence on the verdict. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. During opening statements, the defense counsel raised the affirmative defense of self-defense. In addition, defense counsel elicited testimony to support the affirmative defense during cross examination of a prosecution witness. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

In addition, the court did not abuse its discretion in denying the defendant's motion for a mistrial on the basis that the court improperly allowed cumulative evidence of the defendant's flight to be admitted into evidence. Even though the prosecution elicited testimony during cross-examination that the defendant was living under an assumed name, without establishing the relevance of the evidence as instructed by the court, the court issued a curative instruction to counter any unfair prejudice to the defendant. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party. The court's determination shall be treated as a ruling on a question of law.

Rule 26.2. Written Records

Deleted by amendment November 9, 2006, effective January 1, 2007.

Rule 27. Proof of Official Record

Deleted by amendment November 9, 2006, effective January 1, 2007.

Rule 28. No Colorado Rule**Rule 29. Motion for Acquittal**

(a) **Motion for Judgment of Acquittal.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint, or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the People's case.

(b) **Reservation of Decision on Motion.** If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion After Verdict or Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 14 days after the jury is discharged or within such further time as the court may fix during the 14-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that such a similar motion has been made prior to the submission of the case to the jury.

Source: (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Motion for Judgment of Acquittal.
- III. Motion after Verdict or Discharge of Jury.

I. GENERAL CONSIDERATION.

Judge has more leeway in granting in trial to court. In a trial to the court, the judge sits also as the trier of fact, and, thus, he has considerably more leeway in granting a motion for

judgment of acquittal than if the case were tried before a jury. *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Rule as basis for jurisdiction. *Edwards v. People*, 176 Colo. 478, 491 P.2d 566 (1971); *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974); *People v. Gould*, 193 Colo. 176, 563 P.2d 945 (1977).

Applied in *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976); *People v. Maestas*, 196 Colo. 245, 586 P.2d 4 (1978); *People v.*

Paulsen, 198 Colo. 458, 601 P.2d 634 (1979); People in Interest of G.L., 631 P.2d 1118 (Colo. 1981); People v. Hoffman, 655 P.2d 393 (Colo. 1982).

II. MOTION FOR JUDGMENT OF ACQUITTAL.

Prosecution's burden to withstand motion.

To withstand a motion for a judgment of acquittal, the prosecution has the burden of establishing a prima facie case of guilt and must introduce sufficient evidence to establish guilt beyond a reasonable doubt. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Ramos, 708 P.2d 1347 (Colo. 1985); People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

The prosecution is given the benefit of every reasonable inference which might fairly be drawn from the evidence as long as there is a logical and convincing connection between the facts established and the conclusion inferred. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

The proper standard to be applied to a defendant's motion for acquittal is whether the relevant admissible evidence, both direct and circumstantial, when viewed in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. People v. Gonzales, 666 P.2d 123 (Colo. 1983); People v. Newton, 940 P.2d 1065 (Colo. App. 1996), *aff'd* on other grounds, 966 P.2d 563 (Colo. 1998); People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Prima facie case against defendant required. The primary question for determining the merits of a motion under this rule is: Did the prosecution establish a prima facie case against the defendant? People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

When the state introduces evidence on its case in chief from which the jury may properly infer the essential elements of the crime, the state has then made out a "prima facie" case impregnable against a motion for acquittal. People v. Chavez, 182 Colo. 216, 511 P.2d 883 (1973); People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

Or questions for jury's determination. A court properly denies a defendant's motion for acquittal at the conclusion of all of the evidence where the question of credibility of the witnesses and the ultimate guilt of defendant remain, for such matters are for the jury's determination. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Where record contains ample evidence to sustain a conviction, the trial court is correct in denying the defendant's motion for judgment of acquittal. People v. Small, Jr., 177 Colo. 118,

493 P.2d 15 (1972); People v. Adams, 678 P.2d 572 (Colo. App. 1984).

Standard is same for trial to court or to jury. The standard for determining the merits of a motion for a judgment of acquittal is the same whether the trial is to the court or to a jury. People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

When refusal of motion at end of state's case may be reviewed. When an accused moves for acquittal at the close of the state's case, he is not entitled to have an adverse ruling on the motion reviewed unless he stands on the motion. Silcott v. People, 176 Colo. 442, 492 P.2d 70 (1971); People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972); People v. Becker, 181 Colo. 384, 509 P.2d 799 (1973).

If defendant introduces evidence following denial of a motion for acquittal made at the close of the state's case, the correctness of the ruling is determined from the state of the evidence at the end of the trial. Silcott v. People, 176 Colo. 442, 492 P.2d 70 (1971); People v. Becker, 181 Colo. 384, 509 P.2d 799 (1973).

But review not on state's evidence alone. Where, upon trial court's denial of a defendant's motion for acquittal at close of the state's case, the defendant proceeds to offer evidence warranting submission of case to jury, defendant cannot assert error on the state's evidence alone. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Effect of denial of motion. When a trial court denies a defendant's motion for acquittal, it in effect rules that the evidence presented by the state is entirely consistent with the defendant's guilt and that, upon any reasonable hypothesis, this evidence is not also consistent with the defendant's innocence. Nunn v. People, 177 Colo. 87, 493 P.2d 6 (1972); People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

Role of trial judge in passing upon motion. In passing upon a motion for judgment of acquittal, the trial judge is required to give full consideration to the right of the jury to determine the credibility of witnesses and the weight to be afforded evidence, as well as the right to draw all justifiable inferences of fact from the evidence. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973).

When a trial judge is confronted with a motion for a judgment of acquittal at either the close of the prosecution's case, or the close of all of the evidence, he must determine whether the evidence before the jury is sufficient in both quantity and quality to submit the issue of the defendant's guilt or innocence to the jury. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Franklin, 645 P.2d 1 (Colo. 1982).

The issue before the trial judge in passing upon a motion for judgment of acquittal is whether the relevant evidence, both direct and

circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973); *People v. Waggoner*, 196 Colo. 578, 595 P.2d 217 (1979); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Gomez*, 632 P.2d 586 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *People v. Brassfield*, 652 P.2d 588 (Colo. 1982); *People v. Renstrom*, 657 P.2d 461 (Colo. App. 1982); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984); *People v. Paiva*, 765 P.2d 581 (Colo. 1988); *People v. Williams*, 827 P.2d 612 (Colo. App. 1992); *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

When ruling on a motion for judgment of acquittal, the trial court must consider both the prosecution and the defense evidence. In performing this function, the court is bound by five well-established principles of law. First, the court must give the prosecution the benefit of every reasonable inference, which might be fairly drawn from the evidence. Second, the determination of the credibility of witnesses is solely within the province of the jury. Third, the trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to various pieces of evidence or by resolving conflicts in the evidence. Fourth, a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Finally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture. *People v. Sprouse*, 983 P.2d 771 (Colo. 1999); *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Judge not to invade province of jury. In passing upon a motion for judgment of acquittal, the trial judge should not attempt to serve as a thirteenth juror or invade the province of the jury, but should prevent a case from being submitted to the jury when the prosecution has failed to meet its burden of proof. *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973); *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

The determination of the credibility of witnesses is a matter solely within the province of the jury. Only when the testimony of a witness is so palpably incredible and so totally unbelievable as to be rejected as a matter of law can a court properly take this function from a jury. *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

Testimony is "incredible as a matter of law" if it is in conflict with nature or fully established

or conceded facts. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

Testimony that is merely biased, inconsistent, or conflicting is not incredible as a matter of law. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

Evidence must be viewed favorably to state. In ruling on a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the people. *People v. Chavez*, 182 Colo. 216, 511 P.2d 883 (1973).

The trial court must give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Where prosecution's evidence is insufficient to support conviction in that it does not prove all the elements of the offense charged, the court should enter a judgment of acquittal. *People v. Rutt*, 179 Colo. 180, 500 P.2d 362 (1972).

Juvenile court erred when it denied motion for acquittal where there was a constructive amendment variance between the charge and the evidence presented at trial. *People ex rel. H.W., III*, 226 P.3d 1134 (Colo. App. 2009).

Or fails to establish guilt beyond a reasonable doubt. Where the testimony is not sufficiently clear and convincing, standing alone, to establish guilt beyond a reasonable doubt, the trial court should grant a defendant's motion for acquittal at the end of all the evidence. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

When viewing the evidence upon a motion for acquittal, the trial judge must determine whether a reasonable mind would conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973); *People v. Ramos*, 708 P.2d 1347 (Colo. 1985).

Test for denial of motion where guilt proven by circumstantial evidence. Where the guilt of the defendant is proven by circumstantial evidence, the test for denial of a motion for judgment of acquittal is whether there is evidence in the record from which a jury can find beyond a reasonable doubt that the circumstances are such as to exclude every reasonable hypothesis of innocence. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973).

Substantial evidence test affords same status to circumstantial evidence as to direct evidence, and an exclusively circumstantial case need not exclude every reasonable hypothesis other than guilt to withstand a motion for a judgment of acquittal. *People v. Andrews*, 632 P.2d 1012 (Colo. 1981).

In passing upon a motion for judgment of acquittal, the same test for measuring the sufficiency of evidence should apply, whether the evidence is direct or circumstantial. *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973).

A motion for judgment of acquittal does not preserve a challenge to the foundation for expert testimony that was admitted without objection. Insofar as defendant relied solely on the purported lack of an adequate foundation for the expert opinion, defendant waived the insufficiency of evidence argument. *People v. Wheeler*, 170 P.3d 817 (Colo. App. 2007).

Ruling against the state is a "final judgment". Although the granting of motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, and the declaration of a statute unconstitutional have been abolished by Crim. P. 12(a) and Crim. P. 29(a), the legal effect of the present nomenclature for these procedures is the same, that is, a ruling adverse to the state effectively terminates its prosecution of the defendant and results in a "final judgment". *People v. Cochran*, 176 Colo. 364, 490 P.2d 684 (1971).

A trial court's ruling granting a defendant's motion for judgment of acquittal at the close of the prosecution's evidence is not a final order unless and until the court terminates the trial by dismissing the jury. Before that time, the trial court retains authority to reconsider its ruling. Thus, the court could submit the case to the jury on a lesser included offense. *People v. Scott*, 10 P.3d 686 (Colo. App. 2000).

Defendants in Colorado are on notice that a midtrial order granting a motion for judgment of acquittal is not final and is subject to change until the jury is dismissed. *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

District attorney may appeal. Since the issue of sufficiency of the evidence as postured where the trial court has granted a defendant's motion for judgment of acquittal, involves a question of law, the district attorney is given authority to appeal. *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Though such an appeal is in most instances nonproductive. An appeal after the trial judge has granted a motion for judgment of acquittal upon the completion of the state's evidence on the ground that the evidence is insufficient is, in most instances, a completely nonproductive exercise. *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Trial court's decision not set aside where adequately supported. Upon appeal of the denial of motion for judgment of acquittal, where the trial court is the trier of fact, its decision will not be set aside when adequately supported by the evidence, even though a portion of that evidence may be in conflict. *Stewart v. People*, 175 Colo. 304, 487 P.2d 371 (1971).

Denial of motion for acquittal upheld. *White v. People*, 175 Colo. 119, 486 P.2d 4 (1971); *Mam v. People*, 175 Colo. 242, 486 P.2d 424 (1971); *Kurtz v. People*, 177 Colo.

306, 494 P.2d 971 (1972); *Sergeant v. People*, 177 Colo. 354, 497 P.2d 983 (1972); *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972); *People In Interest of B. L. M. v. B. L. M.*, 31 Colo. App. 106, 500 P.2d 146 (1972); *People v. Olona*, 180 Colo. 299, 505 P.2d 372 (1973); *People v. Thomas*, 181 Colo. 317, 509 P.2d 592 (1973).

Denial of motion for judgment of acquittal held error. *Johns v. People*, 179 Colo. 8, 497 P.2d 1253 (1972); *Velarde v. People*, 179 Colo. 207, 500 P.2d 125 (1972).

Granting of motion for judgment of acquittal disapproved. *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *People v. Gonzales*, 666 P.2d 123 (Colo. 1983); *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Judgment of acquittal upheld. *People v. Emeson*, 179 Colo. 308, 500 P.2d 368 (1972); *People v. Theel*, 180 Colo. 348, 505 P.2d 964 (1973).

III. MOTION AFTER VERDICT OR DISCHARGE OF JURY.

Standard applicable to motions for acquittal made before a case goes to the jury also applies to motions made after verdict or discharge. The court shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction of such offense. *People v. Waggoner*, 196 Colo. 578, 595 P.2d 217 (1979).

Motion may be renewed after verdict. When a motion for judgment of acquittal is made at the close of all the evidence and denied, the motion may be renewed after verdict. *People v. Chapman*, 174 Colo. 545, 484 P.2d 1234 (1971).

Motion satisfies requirement of motion for new trial. The filing of a motion for acquittal satisfies the purpose of a required motion for a new trial, since the only purpose of requiring a motion for new trial is to afford a fair opportunity to the trial court to correct its own errors, and, thus, where a defendant who does not want a new trial repeatedly asserts a motion for acquittal throughout the trial, the denial of the motion puts the defendant in a position to seek review of the judgment. *Haas v. People*, 155 Colo. 371, 394 P.2d 845 (1964).

Court cannot modify jury verdict under this rule. Where there were no instructions tendered, given, or refused on any offense other than the offense charged in the information, but the trial court modified the verdict of the jury, Rule 29(c), Crim. P., delineates the power and discretion of the court under the circumstances, and, accordingly, the cause will be remanded to the trial court with directions to reinstate the verdict of the jury and to rule on defendant's combined motion for judgment of acquittal or, in the alternative, for a new trial. *People v.*

Chapman, 174 Colo. 545, 484 P.2d 1234 (1971).

If the evidence, although conflicting, supports the jury's verdict of guilty, the verdict must be upheld. *People v. Emeson*, 179 Colo. 308, 500 P.2d 368 (1972).

Jury verdicts shall not be reversed for inconsistency if the crimes charged required different elements of proof and the jury could find from the very same evidence that the element of one crime was present while finding that the element of another crime was absent. *People v. Strachan*, 775 P.2d 37 (Colo. 1989).

When a trial judge detects a material deficiency in the evidence after a careful examination of it and expresses a strong and abiding belief that the jury's verdict of guilty cannot stand, it becomes his responsibility to vacate the verdict. *People v. Emeson*, 179 Colo. 308, 500 P.2d 368 (1972).

Court may not sua sponte order a judgment of acquittal after the date it has "fixed" pursuant to section (c), and any extension of time after that date is a nullity for purposes of entertaining a motion for judgment of acquittal. *People v. Darland*, 200 Colo. 276, 613 P.2d 1310 (1980).

Even if victim was grossly inaccurate or confused about the incidents, it was not physically impossible for assaults to have occurred as she testified they did, and victim's therapist testified that inconsistencies and contradictions in her story were normal for a child of recurrent abuse. Thus, child victim's testimony was not incredible as a matter of law, and it was error for trial court to grant defendant's motion for judgment of acquittal notwithstanding the verdict on that basis. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

Rule 30. Instructions

A party who desires instructions shall tender his proposed instructions to the court in duplicate, the original being unsigned. All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on review. Before argument the court shall read its instructions to the jury, but shall not comment upon the evidence. Such instructions may be read to the jury and commented upon by counsel during the argument, and they shall be taken by the jury when it retires. All instructions offered by the parties, or given by court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as a part of the record of the case.

ANNOTATION

- I. General Consideration.
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I. GENERAL CONSIDERATION.

Law reviews. For article, "Limitations of the Power of Courts in Instructing Juries", see 6 Dicta 23 (March 1929). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with the failure to instruct on lesser included offense, see 62 Den. U. L. Rev. 191 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which dis-

cusses a recent case relating to jury instructions, see 15 Colo. Law. 1616 (1986).

"Instruction" construed. An instruction is an exposition of the principles of law applicable to a case, or to some branch or phase of a case, which the jury is bound to apply in order to render the verdict, establishing the rights of the parties in accordance with the facts proved. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).

Jury presumed to understand and heed. In the absence of a showing to the contrary, it is presumed that the jury understands instructions and heeds them. *People v. Motley*, 179 Colo. 77, 498 P.2d 339 (1972); *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972); *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Applied in *Brasher v. People*, 81 Colo. 113, 253 P.2d 827 (1927); *Marshall v. People*, 160 Colo. 323, 417 P.2d 491 (1966); *People v. Butcher*, 180 Colo. 429, 506 P.2d 362 (1973); *People v. Thorpe*, 40 Colo. App. 159, 570 P.2d 1311 (1977); *People v. Padilla*, 638 P.2d 15 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Founds*, 631 P.2d 1166 (Colo. App. 1981); *People v. Dillon*, 633 P.2d 504

(Colo. App. 1981); *Massey v. People*, 649 P.2d 1070 (Colo. 1982); *People v. Handy*, 657 P.2d 963 (Colo. App. 1982); *People v. Jones*, 665 P.2d 127 (Colo. App. 1982).

II. DUTY TO INSTRUCT.

A. In General.

Law reviews. For article, "Jury Nullification and the Rule of Law", see 17 Colo. Law. 2151 (1988).

Purpose of this rule is to enable the trial judge to prevent error from occurring and to correct an error if an improper instruction is tendered. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

The procedure set forth in this rule affords counsel the opportunity to structure closing arguments based on the instructions which will govern the jury's deliberations. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Court has a duty to instruct the jury properly on all of the elements of the offenses charged. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Court has a corresponding duty to correct erroneous instructions. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Counsel has a duty to assist the court by objecting to erroneous instructions and by tendering correct instructions. *Arellano v. People*, 177 Colo. 286, 493 P.2d 1362 (1972); *Fresquez v. People*, 178 Colo. 220, 497 P.2d 1246 (1972); *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988).

It is incumbent on counsel to object to the court's proposed instruction, if defective or deficient, and to request and tender correct instructions, or instructions that have been overlooked or omitted by the court. *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973).

And to request instruction. It is the responsibility of a party's counsel to request an instruction if he believed circumstances warranted, and, having failed to do so, the party cannot afterwards complain that such instruction was not given. *Edwards v. People*, 73 Colo. 377, 215 P. 855 (1923); *Rhodus v. People*, 158 Colo. 264, 406 P.2d 679 (1965).

All objections must be made prior to submission to jury. Defendant must make all objections which he has to instructions prior to their submission to the jury. *People v. O'Donnell*, 184 Colo. 104, 518 P.2d 945 (1974); *People v. Tilley*, 184 Colo. 424, 520 P.2d 1046 (1974).

In determining the propriety of any one instruction, the instructions must be considered as a whole, and, if the instructions as a whole properly instruct a jury, then there is no error. *People v. Kurts*, 721 P.2d 1201 (Colo. App. 1986).

Failure to instruct the jury properly with respect to an essential element of the offense charged generally constitutes reversible error. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985); *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

The trial court's failure to re-instruct the jury on the presumption of innocence and the burden of proof prior to closing arguments did not constitute structural or plain error. The court instructed the jury on these matters before the trial and reminded the jury of these instructions before closing arguments. The court also pointed jurors to their handbooks that included the instruction. This was enough to indicate that jurors were aware of the proper standard of review. *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004).

Jury notebooks are not to supplant the requirement of Crim. P. 30 that jurors be orally instructed prior to closing arguments. *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004).

The practice of instructing the jurors immediately prior to closing arguments has many benefits, including ensuring that the jury hears and considers all the applicable law before deliberations and aiding the overall comprehension of the jury. Because the presumption of innocence and the burden of proof beyond a reasonable doubt are so critical in a criminal case, it is especially important to instruct the jury on those points at the close of the case. *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004).

B. Law of the Case.

Duty to instruct on all issues. The trial court has a duty to properly instruct the jury on every issue presented, and the failure to do so with respect to the essential elements of the crime charged constitutes plain error. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

Ingrained in the law is the right of an accused to insist that the court instruct the jury on all legal questions in order to reach a true verdict. *People v. Woods*, 179 Colo. 441, 501 P.2d 117 (1972).

It is the trial court's duty to instruct the jury on all matters of law which it may consider. *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975).

Trial court has duty to instruct the jury on the law, properly, plainly, and accurately, on every issue presented. *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), *aff'd* on other grounds, 779 P.2d 1307 (Colo. 1989).

Instruction directing the jury to accept as fact any portion of a witness' testimony invades the province of the jury. *People v. Roybal*, 775 P.2d 67 (Colo. App. 1989).

Thus, in a felony child abuse case where the defendant raised the affirmative defense of religious healing, the defendant's tendered instruction asking the court to instruct the jury that the court had determined as a matter of law that the defendant was acting in good faith and that the defendant was a duly accredited practitioner of a recognized church or religion would have invaded the province of the jury, and therefore was properly denied. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Whether or not requested to do so. The court has a duty to fully instruct the jury on every issue presented, whether requested to do so or not. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. *Sopris v. Truax*, 1 Colo. 89 (1868); *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962); *People v. Bercillio*, 179 Colo. 383, 500 P.2d 975 (1972).

And to issues for which evidence has been presented. Instructions should relate to and be confined to issues concerning which evidence has been presented. *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962).

Including presumptions of fact. It is the duty of the court to draw the attention of the jury to the points in the case and to presumptions of fact, which the law authorizes them to deduce from the evidence. *Hill v. People*, 1 Colo. 436 (1872).

As well as issues presented by pleadings. No instruction should be given by the court, either on its own motion or at the request of counsel, which tenders an issue that is not presented by the pleadings or supported by the evidence or which deviates therefrom in any material respect. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968); *Luna v. People*, 170 Colo. 1, 461 P.2d 724 (1969).

Instructions must be plain and accurate. It is the duty of the trial court to instruct the jury so plainly and accurately on the law of the case that they may comprehend the principles involved. *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962); *People v. Garcia*, 690 P.2d 869 (Colo. App. 1984).

It is bad practice to give to the jury instruction on abstract propositions of law not called for by the evidence even though the instruction is harmless. *Nilan v. People*, 27 Colo. 206, 60 P. 485 (1900).

The trial court should instruct on a principle of law when there is some evidence to support it, but should not instruct on abstract principles of law unrelated to the issues in controversy. *People v. Kurts*, 721 P.2d 1201 (Colo. App. 1986).

Or excerpts from court opinions. Mere abstract statements of law or excerpts from court

opinions generally should not be given as instructions. *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962).

Or law review article. To allow counsel to read an opinion from a law review article on the credibility of eyewitness identifications would have substituted the writer for the judge, and usurped the trial court's duty to instruct on the law. *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975).

Sufficiency of instruction determined by facts of case. The question of the sufficiency of instructions must be determined always by the facts of each case. *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962).

Requested instruction not justified by the evidence is properly refused. *Morletti v. People*, 72 Colo. 7, 209 P. 796 (1922); *Kinselle v. People*, 75 Colo. 579, 227 P. 823 (1924); *Dickson v. People*, 82 Colo. 233, 259 P. 1038 (1927); *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (1962).

And refusal is not error. Where the court finds that there is no evidence of a certain matter, it is not error to refuse to instruct thereon. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

C. Defendant's Theory.

Accused in a criminal case is entitled to an instruction based on his theory of the case. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968); *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972); *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973); *People v. Griego*, 183 Colo. 419, 517 P.2d 460 (1973); *People v. White*, 632 P.2d 609 (Colo. App. 1981); *People v. Anaya*, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988); *People v. Banks*, 804 P.2d 203 (Colo. App. 1990).

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory, the rationale being the belief that it is for the jury and not the court to determine the truth of the defendant's theory. *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

A trial court has an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court. *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

Although an alibi defense not an affirmative defense so as to place on the People the burden of proof to rebut, and trial court did not err by refusing a theory of case instruction treating alibi as an affirmative defense, defendant was entitled to a properly worded instruction setting forth his theory of the case. *People v. Nunez*, 824 P.2d 54 (Colo. App. 1991).

As constitutional right. A defendant has a constitutional right to have a lucid, accurate, and comprehensive statement by the court to the jury of the law on the subject from his standpoint. *Bustamonte v. People*, 157 Colo. 146, 401 P.2d 597 (1965).

No matter how improbable or unreasonable the contention, a defendant is entitled to an appropriate instruction upon the hypothesis that it might be true. *Johnson v. People*, 145 Colo. 314, 358 P.2d 873 (1961); *People v. Moya*, 182 Colo. 290, 512 P.2d 1155 (1973); *People v. Banks*, 804 P.2d 203 (Colo. App. 1990); *People v. Nunez*, 841 P.2d 261 (Colo. 1992); *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

Or poorly drafted. The fact that an instruction on the defendant's theory may be ineptly worded, grammatically incorrect, or inaccurate in some particular does not excuse the trial court from properly instructing on the theory of defense, assuming there is evidence to support such an instruction. *People v. Moya*, 182 Colo. 290, 512 P.2d 1155 (1973).

Failure to give instruction requires new trial. Where no instruction is given by the trial court embodying the theory of defendant, a new trial must be had. *Johnson v. People*, 145 Colo. 314, 358 P.2d 873 (1961).

Because the determination of the truth of defendant's theory is a jury function, it is error for the court to refuse to give defendant's instruction on the theory of his defense. *People v. Moya*, 182 Colo. 290, 512 P.2d 1155 (1973); *Nora v. People*, 176 Colo. 454, 491 P.2d 62 (1971).

No new trial required if erroneous instruction causes no prejudice. Where instruction implied that one nonessential factor was an element of the crime, but jury's finding on that point was immaterial to the verdict and defense counsel was not unfairly misled in formulating closing argument or prevented from arguing any meritorious defense, denial of defense's motion for mistrial was not an abuse of discretion. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

The failure to give a jury instruction on a defendant's theory of the case constitutes reversible error. *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

Instruction must be grounded upon evidence and in proper form. A defendant under certain circumstances is entitled to an instruction based on his theory of the case, but it must be grounded upon the evidence and not a mere fanciful invention of counsel nor one involving an impossibility, and it must be in proper form. *Mam v. People*, 175 Colo. 242, 486 P.2d 424 (1971); *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Defendant is entitled to an instruction on his theory of the case subject to two conditions:

The instruction must be in proper form, and must be supported by evidence in the record. *People v. Duran*, 185 Colo. 359, 524 P.2d 296 (1974).

Defendant's jury instruction on his theory of the case must be in proper form and based on evidence in the record. *People v. Griego*, 183 Colo. 419, 517 P.2d 460 (1973).

A defendant is entitled to an instruction on his theory of the case, provided it is grounded in the evidence. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

A defendant is entitled to instructions consistent with his theory of the case if there is evidence to support it. *People v. Nace*, 182 Colo. 127, 511 P.2d 501 (1973); *People v. Travis*, 183 Colo. 255, 516 P.2d 121 (1973); *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974); *People v. Shearer*, 650 P.2d 1293 (Colo. App. 1982); *People v. Banks*, 804 P.2d 203 (Colo. App. 1990).

General instruction should be adapted to defendant's theory. When a general instruction does not particularly direct the jury's attention to defendant's theory, it is the duty of the court either to correct the tendered instruction or to give the substance of it in an instruction drafted by the court. *Nora v. People*, 176 Colo. 454, 491 P.2d 62 (1971).

Or supplementary instruction given. If a statutory instruction does not fit a particular case, or if it is given and yet other supplementary instructions are needed to state a defendant's position, then such, when properly worded and tendered, should be submitted to the jury. *Bustamonte v. People*, 157 Colo. 146, 401 P.2d 597 (1965).

No instruction where no theory other than denial set forth. When a tendered instruction does not set forth any theory of the case other than a general denial, is merely a restatement of defendant's evidence without any resultant theory, and is merely another attempt to reargue the case, the defendant is not entitled to have it reiterated in instructions given by the court. *Mam v. People*, 175 Colo. 242, 486 P.2d 424 (1971); *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

A defendant is not entitled to an instruction on a theory of the case that is simply a denial of the charges and a trial court may also refuse to give a tendered theory of the case instruction which contains argumentative matter or which is merely a restatement of the defendant's evidence. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Defendant not entitled to different instructions concerning same subject. Though a defendant is entitled to an instruction on his theory of the case, he is not entitled to different instructions, all concerning the same general subject, and each couched in only slightly dif-

ferent verbiage. *Bennett v. People*, 168 Colo. 360, 451 P.2d 443 (1969).

A properly worded instruction setting forth defendant's theory, when supported by the evidence, should always be given by a trial court unless the defendant's theory is encompassed in other instructions to the jury. *People v. Moya*, 182 Colo. 290, 512 P.2d 1155 (1973); *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974).

All that is required is that the theory of the case be accurately embodied in the instructions given by the court. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972); *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

The trial court properly rejected defendant's theory of defense instruction on the grounds that it was argumentative, did little more than summarize defendant's version of the incident, and was encompassed within the other instructions. *People v. Lee*, 18 P.3d 192 (Colo. App. 2000).

Once a principle is covered it is not error to refuse to repeat the instruction in other language. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972); *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

Instruction may be refused where jury otherwise adequately instructed. Where the jury is adequately instructed by the court and defendant's instructions would add nothing, it is not error to refuse to give instructions tendered by the defendant. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971); *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972); *People v. Shearer*, 650 P.2d 1293 (Colo. App. (1982); *People v. Cole*, 926 P.2d 164 (Colo. App. 1996); *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

No error occurred when trial court refused to give instruction requested by defendant which merely restated points covered by other instructions and reiterated a general denial of guilt. *People v. Anaya*, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

No abuse of discretion by court in refusal to give defendant's proposed misidentification instructions when such instructions were repetitive, were substantially included in stock instructions, and placed undue emphasis on a single issue presented by the evidence. *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989); *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

Where tendered instructions do not contain a correct statement of the law, and the instructions given by the court adequately advise the jury of the refusal to submit defendant's tendered instructions, which are covered by those given by the trial court, is not error.

Quintana v. People, 178 Colo. 213, 496 P.2d 1009 (1972).

Evidence of affirmative defense of "treatment by spiritual means" in criminal child abuse case was sufficient to require trial court to instruct the jury on such defense. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Where the trial record contained substantial evidence to support the defendant's alibi theory of defense and the jury instructions set forth only the elements of the offense and the burden of proof and did not encompass or embody the defendant's defense of alibi, it was reversible error for the trial court to fail to correct the tendered alibi instruction or to incorporate an alibi instruction in the other jury instructions. *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

III. FORM.

Object of rule. One object of this rule is that the jury may have all the instructions before them when they retire to consider their verdict, and in that view it can make but little difference whether instructions are given orally or read from a book, for, in either case, they would be equally liable to forget them. *Gile v. People*, 1 Colo. 60 (1867).

All instructions must be submitted to the jury in writing. *Dorsett v. Crew*, 1 Colo. 18 (1864); *Gile v. People*, 1 Colo. 60 (1867); *Nieto v. People*, 160 Colo. 179, 415 P.2d 531 (1966).

Failure to do so is error. Failure to submit instructions to the jury in writing has always been held to be an error. *Dorsett v. Crew*, 1 Colo. 18 (1864); *Gile v. People*, 1 Colo. 60 (1867); *Nieto v. People*, 160 Colo. 179, 415 P.2d 531 (1966).

Giving instructions orally not error if without prejudice. If a statement can be considered as an instruction as to the law, it being in favor of the plaintiff in error, giving it orally is at most an error without prejudice, and one that does not constitute a ground for reversal. *Irving v. People*, 43 Colo. 260, 95 P. 940 (1908); *Martinez v. People*, 124 Colo. 170, 235 P.2d 810 (1951).

Instructions cannot be orally qualified or modified. *Dorsett v. Crew*, 1 Colo. 18 (1864).

But failure of counsel to object to oral clarifying comments made by the trial court in response to a request by the jury, particularly where counsel is a more or less active participant in this further instructing of the jury, amounts to a waiver of any rights afforded by this rule. *Valley v. People*, 165 Colo. 555, 441 P.2d 14, cert. denied, 393 U.S. 925, 89 S. Ct. 256, 21 L. Ed. 2d 260 (1968).

There is no restriction to the giving of additional written instructions to the jury by the court, in a proper case, after they have

retired to consider their verdict. *Davis v. People*, 83 Colo. 295, 264 P. 658 (1928).

But should be given in presence of counsel. Good practice requires that the court, before giving such an instruction, should call the jury into the courtroom and read it to them in the presence of counsel for both sides, unless they waive this formality, inasmuch as trial courts should not communicate with the jury on matters affecting the rights of the parties except in open court and in the presence of counsel. *Ray v. People*, 147 Colo. 587, 364 P.2d 578 (1961).

If not, there must be prejudice for reversible error. While the giving of an additional instruction outside of the presence of counsel is bad procedure, it is not reversible error where it does not appear that it in any manner prejudices the rights of the defendant. *Ray v. People*, 147 Colo. 587, 364 P.2d 578 (1961).

Comments to jury are not instructions. Comments to the jury are advisory and in no respect binding upon the jury, hence they are not instructions, and therefore they need not precede the arguments nor be reduced to writing as provided in this rule. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).

Provided they do not modify or qualify instructions. The remarks of the trial court do not constitute an instruction within this rule where they are merely an oral direction which in no way modifies or qualifies an instruction given. *Irving v. People*, 43 Colo. 260, 95 P. 940 (1908).

"Instructions" to jury to revise verdicts not within rule. Where, upon verdict, the judge "instructs" the jury that the accused cannot be convicted of more than one offense and directs them to revise their verdict, these remarks are not instructions within the meaning of this rule. *Bush v. People*, 68 Colo. 75, 187 P. 528 (1920).

Nor court's answer to jury on what is charged. When the jury asks the court whether defendant is charged with a certain offense only or with that offense and another, the court's answer to the jury's question is not an instruction to the jury within the meaning of the provisions of this rule. *Wiseman v. People*, 179 Colo. 101, 498 P.2d 930 (1972).

Trial court's response to jury's question concerning instructions outside the presence of defense counsel was reversible error because it was a denial of the constitutional right to counsel. Such error is harmless only if so demonstrated beyond a reasonable doubt. If jury's question shows a fundamental misunderstanding of the instructions, it is prejudicial to the defendant. *Leonardo v. People*, 728 P.2d 1252 (Colo. 1986).

Three instructions on one page not error. Where trial court instructed jury by placing three instructions on one sheet of paper — instructions related to the burden of proof, the presumption of innocence, and reasonable

doubt — and defendant contends the jury was thereby confused, but no contention is made that the instructions did not properly set forth the law, and defendant has totally failed to suggest how these three instructions, if given on three separate sheets of paper, would have resulted in greater clarity, nor does he explain how the placing of the instructions on one sheet of paper would confuse the jury, this claim of error is totally without merit. *People v. Romero*, 182 Colo. 50, 511 P.2d 466 (1973).

The court committed harmless error in failing to give the jury cautionary hearsay instructions after each hearsay witnesses' testimony. Three hearsay witnesses testified in sequence, the court gave the cautionary instruction following the testimony of the last hearsay witness and during the general charge to the jury, and the hearsay testimony corroborated the testimony of other witnesses. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

IV. CONTENT.

A. In General.

No instruction which is contradictory in itself is good. *Magwire v. People*, 77 Colo. 149, 235 P. 339 (1925).

Irreconcilable instructions require reversal. Where instructions given by the court are irreconcilable, and it is impossible to say which the jury followed or what the verdict would have been but for the error, a reversal is imperative. *Clair v. People*, 9 Colo. 122, 10 P. 799 (1886); *White v. People*, 76 Colo. 208, 230 P. 614 (1924).

Erroneous instruction is not cured by another covering the same point which is correct. *Mackey v. People*, 2 Colo. 13 (1873); *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Cumulative effect of improper instruction with proper instruction was to provide the jury with mixed messages and did not dispel the potential for harm created by erroneous instruction. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

All instructions are to be taken together, and what might mislead, when considered by itself, may be corrected by another passage of the charge. *Forte v. People*, 57 Colo. 450, 140 P. 789 (1914); *Clarke v. People*, 64 Colo. 164, 171 P. 69 (1918); *Taylor v. People*, 21 Colo. 426, 42 P. 652 (1895); *Ausmus v. People*, 47 Colo. 167, 107 P. 204 (1910).

Instructions in a case must be read and considered as a whole. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972); *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

In determining the effect of a particular instruction, it must be read in conjunction with the other instructions. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Not error if jury adequately informed. Where the instructions, when read together, adequately inform the jury of the applicable law, there is no error. *Blincoe v. People*, 178 Colo. 34, 494 P.2d 1285 (1972).

If, taken as a whole, the instructions adequately inform the jury of the law, there is no reversible error. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Even though one instruction is not proper. Where one instruction is not entirely proper, its use does not constitute reversible error when the instructions read as a whole adequately inform the jury on the law. *People v. Olona*, 180 Colo. 299, 505 P.2d 372 (1973).

Where the law of the case is clearly and explicitly set forth in one point of the charge, the effect of equivocal language elsewhere is thereby eliminated. *LeMaster v. People*, 54 Colo. 416, 131 P. 269 (1913).

An inadequate instruction is not deemed to constitute fundamental error although it does not fully instruct the jury as to the definition of the crime, nor follows the statutory definition, where, when it is read in conjunction with the other instructions, it appears that in substance the jury is told of the elements of the crime. *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968).

The omission from one instruction of the words "from the evidence" does not constitute reversible error when, by other instructions, the jury is told that its findings must be based upon the evidence, and that alone. *Gorman v. People*, 7 Colo. 596, 31 P. 335, 31 Am. St. R. 350 (1884); *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896).

Improper jury instructions not grounds for reversal on appeal where defendant did not object to such instructions at trial and failed to raise such issue in motion for new trial. *People v. Quintana*, 701 P.2d 1264 (Colo. App. 1985).

When reversal not required despite failure to instruct on element. Where the court fails to give an instruction on one element of a crime, reversal is not called for when the prima facie case established by the state stands un rebutted, the defendant offers no defense of which he is deprived by the failure to give the instruction, and he does not object to the instructions given nor request other instructions. *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968).

It is not error to refuse cumulative instructions. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885).

Since requested instructions need not be given when covered by other instructions. It is not error for a trial court to fail to give a tendered instruction covering the same matter already dealt with in other instructions. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974);

People v. Lee, 199 Colo. 301, 607 P.2d 998 (1980); *People v. Garcia*, 690 P.2d 869 (Colo. App. 1984).

Perhaps no point of law is more amply substantiated in Colorado than the rule that requested instructions which are covered by instructions given by the court are properly refused. *Dougherty v. People*, 1 Colo. 514 (1872); *May v. People*, 8 Colo. 210, 6 P. 816 (1885); *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895); *Benedict v. People*, 23 Colo. 126, 46 P. 637 (1896); *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899); *Covington v. People*, 36 Colo. 183, 85 P. 832 (1960); *O'Grady v. People*, 42 Colo. 312, 95 P. 346 (1908); *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913); *De Rinzie v. People*, 56 Colo. 249, 138 P. 1009 (1914); *McKee v. People*, 72 Colo. 55, 209 P. 632 (1922); *Brindisi v. People*, 76 Colo. 244, 230 P. 797 (1924); *Roll v. People*, 78 Colo. 589, 243 P. 641 (1926); *Wilder v. People*, 86 Colo. 35, 278 P. 594, 65 A.L.R. 1260 (1929); *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930); *Gould v. People*, 89 Colo. 596, 5 P.2d 580 (1931); *Farmer v. People*, 90 Colo. 250, 7 P.2d 947 (1932); *Jagger Prod. Co. v. Gylling*, 90 Colo. 517, 10 P.2d 942 (1932); *Updike v. People*, 92 Colo. 125, 18 P.2d 472 (1933); *Militello v. People*, 95 Colo. 519, 37 P.2d 527 (1934).

Instructions for multiple offenses. It is error for court to instruct jury that it could convict if evidence showed crime occurred within 3 years prior to filing of information. Such instruction is only proper if evidence proves one act, but date of incident is in question. *Woertman v. People*, 804 P.2d 188 (Colo. 1991).

Because they tend to confuse jury. When a proposition of law is once clearly stated in the charge, a repetition thereof in the same or different language only tends to confuse the jury. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885).

Combining instructions not abuse of discretion. Combining in one instruction the instructions on presumption of innocence, burden of proof, and reasonable doubt does not amount to an abuse of discretion, where no prejudice is shown. *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973).

Particular portions of evidence should not be singled out and emphasized by special instructions. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Special instruction unfair if not warranted by the evidence. Where the evidence does not warrant it, a special instruction is unfair and a basis for reversible error. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

When an instruction conceivably could be improved by rephrasing in certain particulars, yet it adequately states the basic requirements, then the jury is properly charged. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

Although an instruction may be unduly prolix, if it properly advises the jury it is not in error. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Instruction interfering with jurors' deliberation is error. Where there is little doubt that the giving of an additional instruction interferes with the free and unbiased deliberation of the jurors, the trial court errs in acting, abusing its discretion. *Mogan v. People*, 157 Colo. 395, 402 P.2d 928 (1965).

A defendant's due process rights are violated when a trial court intrudes on the jury's deliberative process and deprives the jury of its fact-finding duty. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

The court's response to the jurors' question effectively amounted to an impermissible directed verdict, where the primary contested issue at trial was the defendant's authority to borrow money from victim's account and that response left the jury with no alternative but to determine that defendant had no such authority. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Instruction may assume commission of a crime. In a prosecution where there was no dispute at all that a crime was committed and the only defense made is that it was done by another, that the defendants had no part in it, and that instead of encouraging or assisting the criminal they came to the rescue of the injured party, and instruction that "if you believe beyond a reasonable doubt from all the facts and circumstances and evidence in the case that these men aided, abetted and encouraged the offense then you may find them guilty as charged in this information", is not reversible error because it assumes the commission of the crime instead of requiring the jury to find such fact beyond a reasonable doubt from the evidence. *Komrs v. People*, 31 Colo. 212, 73 P. 25 (1903).

B. Statutory Language.

Instruction based on statute upheld. In a felony child abuse case, the court properly instructed the jury that if the prosecution proved beyond a reasonable doubt that a reason other than spiritual treatment existed demonstrating that the child was endangered, the defendant was not entitled to the affirmative defense of spiritual healing. In addition, an instruction referring to the statutory duty of a parent to provide medical care was proper. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), *rev'd on other grounds*, 807 P.2d 570 (Colo. 1991).

Trial court's decision to use instruction tracking deadly physical force language in § 18-1-704 instead of instruction containing specific language requested by defendant was not erro-

neous. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

It is a good rule to couch instructions in the language of a statute. *Bustamonte v. People*, 157 Colo. 146, 401 P.2d 597 (1965).

Objection to such instruction is not tenable. The objection that instructions in a criminal case are given in the language of a statute is not tenable. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

If the language is clear. Where an instruction is worded substantially in the language of the statute, no more is required if the language is clear. *People v. Dago*, 179 Colo. 1, 497 P.2d 1261 (1972); *People v. Pahlavan*, 83 P.3d 1138 (Colo. App. 2003).

Other instructions may be proper. An instruction couched in the language of a statute is not the only type of instruction that is proper. *Bustamonte v. People*, 157 Colo. 146, 401 P.2d 597 (1965).

Inclusion of inapplicable provisions not necessarily error. Even in cases where the inclusion verbatim of inapplicable subsections of statutes in instructions to the jury are said to be improper, the giving of such an instruction does not, in itself, constitute reversible error. *Bodhaine v. People*, 175 Colo. 14, 485 P.2d 116 (1971).

Instruction based on statute upheld. Where instructions on specific intent are phrased in the language of a statute, such instructions are proper and will be upheld on review. *Blincoe v. People*, 178 Colo. 34, 494 P.2d 1285 (1972).

Jury instruction which is in conflict with the legislative intent of § 18-1-407 concerning affirmative defenses should not be used. *People v. Rex*, 689 P.2d 669 (Colo. App. 1984).

In instructing the jury on the issue of the voluntariness of a confession, the court need not define the term since the general understanding of the word is clear. *Kwiatkowski v. People*, 706 P.2d 407 (Colo. 1985).

Jury instruction providing supplemental definition of "knowing" for the purposes of second degree murder was unnecessary, but was not reversible error. The trial court's instruction did not pose a barrier to the jury in considering fully the defendant's affirmative defense. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

C. Particular Instructions.

Giving or refusal of cautionary instructions rests largely in the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion and resulting prejudice to the defendant the trial court's ruling will not be disturbed. *Luna v. People*, 170 Colo. 1, 461 P.2d 724 (1969).

Such as on weighing testimony of private detectives. The giving of instructions as to the

caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law and rests largely in the discretion of the trial judge. *O'Grady v. People*, 42 Colo. 312, 95 P. 346 (1908).

Where the jury has been instructed to disregard tendered evidence, it must be presumed that the jury in the performance of its duty did so. *People v. Goff*, 187 Colo. 103, 530 P.2d 514 (1974).

Credibility of defendant's testimony. The jury may be instructed that in determining the credibility of the defendant in a criminal case testifying in his own behalf, they have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct during the trial. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1884); *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896); *O'Brien v. People*, 42 Colo. 40, 94 P. 284 (1908).

Of witness who has wilfully testified falsely. An instruction directing the jury that they are at liberty to disregard the entire testimony of a witness who has wilfully testified falsely to a material point is good. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885).

Only one instruction on credibility of witnesses necessary. The practice of giving two instructions on the credibility of witnesses is not necessary, and is not the modern trend, for it is the better practice to give only one instruction as to credibility of witnesses. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

It is not error to deny a special instruction on credibility of eyewitnesses where a general instruction on credibility is given. *People v. Ross*, 179 Colo. 293, 500 P.2d 127 (1972); *People v. Lopez*, 182 Colo. 152, 511 P.2d 889 (1973).

Where the stock instruction on credibility includes language of caution to the jury applicable to the witnesses' testimony, it is not an abuse of the trial court's discretion to refuse another cautionary instruction. *Luna v. People*, 170 Colo. 1, 461, P.2d 724 (1969).

The failure of the court sua sponte to specially instruct the jury on an identification issue is not patently prejudicial where the jury is given an instruction concerning the credibility of witnesses which details the factors to be considered by them such as means of knowledge, strength of memory, and opportunities for observation. *Fresquez v. People*, 178 Colo. 220, 497 P.2d 1246 (1972).

But separate instruction on defendant's credibility not error. While it is unnecessary and poor practice to give the jury a separate instruction on the credibility of a defendant as a witness, the giving of such an instruction does not constitute reversible error. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

The giving of separate instruction dealing with the credibility of defendant as witness was not reversible error, although the better procedure is to give only one integrated credibility instruction. *Lamb v. People*, 181 Colo. 446, 509 P.2d 1267 (1973).

Including in sanity trial. In a sanity trial, the court does not commit prejudicial error by instructing the jury specifically concerning the test of defendant's credibility as a witness, while a general instruction on the credibility of witnesses is also given. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. *Clair v. People*, 9 Colo. 122, 10 P. 799, 97 Am. St. R. 780 (1886).

If in ruling upon the sufficiency or insufficiency of evidence in circumstantial evidence cases judges must follow the rule that the evidence must be consistent with guilt and inconsistent with innocence, it follows that the better practice is to so advise the jury. *People v. Calise*, 179 Colo. 162, 498 P.2d 1154 (1972).

No error if defendant is not prejudiced. Where an instruction conveys the essence of the law to be applied in regard to circumstantial evidence and when all the instructions are read as a whole the defendant is not prejudiced by this instruction which does not include the language that "the circumstances relied upon must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence", there is no error. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

Circumstantial evidence held sufficient basis for instruction. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Stock instruction on presumption of innocence held inappropriate. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *Brown v. People*, 177 Colo. 397, 494 P.2d 587 (1972).

For instruction on presumption of innocence recommended by supreme court, see *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Trial court need not instruct jury to exclude every reasonable hypothesis of innocence where the evidence of defendant's guilt was primarily direct. *People v. Lopez*, 182 Colo. 152, 511 P.2d 889 (1973).

A court does not err in instructing the jury that they are "not to search for a doubt". *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973).

Where instruction on presumption of innocence was given prior to recommendation of supreme court that it be reworded to exclude objectionable language, giving of such instruc-

tion was not reversible error. *People v. Pacheco*, 180 Colo. 39, 502 P.2d 70 (1972).

The giving of a stock instruction on the presumption of innocence does not constitute reversible error just because of its historical use. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

Submitting erroneous instruction on presumption of innocence would ordinarily require reversal, but only if the defendant objected to the instruction. *People v. Simmons*, 182 Colo. 350, 513 P.2d 193 (1973).

Instruction that defendant not compelled to testify. It is error to refuse a tendered instruction that the defendant is not compelled to testify, and that the fact that he does not testify cannot be used as an inference of guilt and should not prejudice him in any way. *People v. Crawford*, 632 P.2d 626 (Colo. App. 1981).

Limiting instruction on prior convictions. When defendant's prior felony convictions are elicited during his testimony, a limiting instruction is required. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

Instructions where evidence of other crimes is used. When evidence from other crimes is used: First, the prosecutor should advise the trial court of the purpose for which he offers the evidence; secondly, if the court admits such evidence, it should then and there instruct the jury as to the limited purpose for which the evidence is being received and for which the jury may consider it; thirdly, the general charge should contain a renewal of the instruction on the limited purpose of such evidence; lastly, the offer of the prosecutor and the instructions of the court should be in carefully couched terms—they should refer to "other transactions", "other acts", or "other conduct" and should eschew such designations as "similar offenses", "other offenses", "similar crimes", and so forth. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Where evidence relating to other prior incidents of a similar nature between the defendant and the prosecuting witness is admitted, and the court gives an oral cautionary instruction to the jury on the limited relevance of similar act testimony at the conclusion of the prosecuting witness's testimony as well as a similar written instruction when the case is submitted to the jury, there is no reversible error. *People v. Elliston*, 181 Colo. 118, 508 P.2d 379 (1973).

Even when defendant has not requested such. Where the trial judge instructs the jury on the limited purposes for which evidence of prior felony convictions is admitted when the defendant has not requested such an instruction, such action is proper inasmuch as the judge has a duty to instruct the jury on the limited purpose for which such evidence is admissible in his

general instructions. *Lee v. People*, 170 Colo. 268, 460 P.2d 796 (1969).

Evidence of former convictions used to attack credibility. Where testimony as to former convictions is elicited for the purpose of attacking the defendant's credibility, the court acts properly in so instructing the jury. *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972).

When instructing a deadlocked jury deliberating a charge involving lesser offenses, the court should first ask whether there is a likelihood of progress towards a unanimous verdict upon further deliberation. If the jury indicates that a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses or, instead, whether the division centers only on the particular degree of guilt. *People v. Lewis*, 676 P.2d 682 (Colo. 1984); *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

When a lesser offense involves elements that are not necessarily included in a greater offense, the additional instruction should set forth the nonincluded elements of the offense and should advise the jury that before the defendant can be found guilty of that particular offense each of the jurors must be satisfied beyond a reasonable doubt that the defendant acted in such a manner so as to satisfy all of the nonincluded elements. *People v. Lewis*, 676 P.2d 682 (Colo. 1984).

Instruction on lesser included offense limited. The rule that an instruction on a lesser included offense is required when requested is limited to those cases where there is evidence to support such an instruction. *People v. Ross*, 179 Colo. 293, 500 P.2d 127 (1972).

A defendant is entitled to an instruction on a lesser included offense, unless it is clear from the evidence that the defendant is guilty of the greater offense or nothing at all. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Mere chance of the jury's rejection of uncontroverted testimony and conviction on a lesser charge does not necessitate an instruction on the lesser charge. *People v. Campbell*, 678 P.2d 1035 (Colo. App. 1983).

The giving of such instruction is not mandatory. Where the court already knew that a juror disagreed with the other jurors and felt pressured to issue a verdict against her conscience, court had reasonable concern that such an instruction could be perceived as coercive. *People v. Barnard*, 12 P.3d 290 (Colo. App. 2000).

Defendant was not entitled to special instruction concerning testimony of immunized witnesses where, considering circumstances of case, the standard credibility instruction given by trial court was sufficient. *People v. Loggins*, 709 P.2d 25 (Colo. App. 1985).

There must be evidence tending to establish lower grade. In a prosecution for a crime which includes within the charge lower grades of crime, where there is any evidence tending to establish a lower grade, the jury should be instructed as to such lower grade; but, where there is no evidence tending to establish a lower grade, such lower grade should not be submitted to the jury. *Carpenter v. People*, 31 Colo. 284, 72 P.1072 (1903).

Lesser nonincluded offense. A defendant is entitled to an instruction on a lesser nonincluded offense when he requests such an instruction and there is evidence to support it. *People v. Best*, 665 P.2d 644 (Colo. App. 1983).

Trial court's refusal to give a lesser nonincluded offense instruction does not justify reversal if the court instructed on a comparable lesser nonincluded offense. *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

The decision whether to request a lesser offense instruction is a matter to be decided by counsel after consultation with the defendant. *Arko v. People*, 183 P.3d 555 (Colo. 2008).

Instruction on reasonable doubt upheld. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885); *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972); *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972); *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

An instruction to the jury that a reasonable doubt must be grounded upon irreconcilable evidence is incorrect, because the evidence may be insufficient to prove the charge. *Mackey v. People*, 2 Colo. 13 (1873).

Instruction on general intent upheld. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

But inadequate for specific intent crime. An instruction on general intent is inadequate guidance for a jury deliberating specific intent crime. *People v. Mingo*, 181 Colo. 390, 509 P.2d 800 (1973).

Instruction on specific intent read in context with other instructions which made specific reference to specific intent, requiring proof of each element beyond a reasonable doubt, adequately informs the jury of the law. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

Instruction omitting specific "animus" improper. An instruction which makes the question of guilt depend solely upon the intentional doing of an unlawful act constitutes prejudicial error in cases where the specific "animus" as a material element of the crime for which the accused is convicted is omitted. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Instruction dealing with the effect of defendant's statement does not require for its submission that the defendant's statement reached the level of a confession or a direct

admission of a crime. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973).

Instruction on definition of confession held properly denied. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction on weight given confession is improper comment on evidence. An instruction that tells a jury that a confession may be entitled to great weight is an improper comment upon the weight of the evidence. *Fincher v. People*, 26 Colo. 169, 56 P. 902 (1899).

Admonition does not cure erroneous admission of incriminating statement. An admonition or an instruction to the jury to disregard involuntary incriminating statements does not cure the erroneous admission of such statements. *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971).

Unless such is not an issue of significance. Where the admissions of the defendant in the nature of either extrajudicial statements or a confession is not an issue of significance, the giving of an instruction on them is not grounds for relief. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Instruction held not to be judicial comment on the evidence. *People v. Olona*, 180 Colo. 299, 505 P.2d 372 (1973).

Comments of counsel. Where the trial judge instructed the jury that comments of counsel were not evidence and should not be considered as such, in the absence of a showing to the contrary, it is presumed that the jury understood the instructions and heeded them. *People v. Becker*, 187 Colo. 344, 531 P.2d 386 (1975).

Instruction defining accomplice held not fatally erroneous. *Komrs v. People*, 31 Colo. 212, 73 P. 25 (1903).

Instruction on accomplice's testimony held proper. *Wisdom v. People*, 11 Colo. 170, 17 P. 519 (1887); *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

Instruction on evidence showing plan, scheme, and design held proper. *Mays v. People*, 177 Colo. 92, 493 P.2d 4 (1972).

Instruction on flight. Where there is evidence of flight as a deliberate attempt to avoid detection or arrest for a crime just committed, an instruction on flight is proper. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968); *Nunn v. People*, 177 Colo. 87, 493 P.2d 6 (1972).

Instruction on alibi held sufficient. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

Instruction on alibi held liable to mislead jury and was therefore grounds for new trial. *Wisdom v. People*, 11 Colo. 170, 17 P. 519 (1887).

Instruction on negligence held valid. *People v. Olona*, 180 Colo. 299, 505 P.2d 372 (1973).

Instruction on complicity appropriate where evidence was sufficient to show that two or more persons were jointly engaged in the commission of a crime. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Instruction on defendant's denials and theory of case held error. Trial court's instruction that defendant's denials of charges and theory of case were issues but not evidence held incorrect statement of law and reversible error. *People v. Herbison*, 761 P.2d 263 (Colo. App. 1988).

State's pattern reasonable doubt jury instruction accurately describes proof beyond a reasonable doubt. *People v. Alvarado-Juarez*, 252 P.3d 1135 (Colo. App. 2010).

Where trial court should have given an additional clarifying instruction, its failure to do so did not constitute prejudicial error where conviction could not have been affected by the lack of response to jurors' inquiry. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Trial court's comment regarding whether defendant was the initial aggressor did not violate this rule and did not constitute error, much less plain error. With respect to a trial court's comments, questions, and demeanor, more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal. The record must clearly establish bias, and the test is whether the trial judge's conduct so departed from the required impartiality as to deny the defendant a fair trial. *People v. Martinez*, 224 P.3d 1026 (Colo. App. 2009), *aff'd* on other grounds, 244 P.3d 135 (Colo. 2010).

Court responded to defendant's objection to prosecutor's closing argument about self-defense by finding there was "some evidence" defendant was initial aggressor. Its ruling was on a matter of law, it did not invade the fact-finding province of the jury, and court immediately instructed jurors that they were to decide the facts. *People v. Martínez*, 224 P.3d 1026 (Colo. App. 2009), *aff'd* on other grounds, 244 P.3d 135 (Colo. 2010).

Failure to give curative instruction not reversible error. Failure to give a curative instruction, in the absence of a request by defense counsel, did not constitute reversible error. *People v. Rogers*, 187 Colo. 128, 528 P.2d 1309 (1974).

Curative jury instruction to disregard prior invalid conviction remedied any harm that may have resulted from reference to the invalid conviction. *People v. McNeely*, 68 P.3d 540 (Colo. App. 2002).

Instructions as a whole held to have adequately advised jury on premeditation. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Instruction reducing prosecutor's obligation prejudicial. Prejudice to the defendant is

inevitable when the court instructs the jury in such a way as to reduce the prosecution's obligation to prove each element of its case beyond a reasonable doubt. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974); *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Cumulative instructions containing erroneous statements of law and which were at odds with the standard jury instructions on affirmative defenses had the effect of relieving the prosecution of its burden of proof in regard to affirmative defenses. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Trial court's additional instruction in response to jury's inquiry not error because defendant acceded to instruction and the inquiry did not show any misunderstanding or confusion on a matter of law central to the defendant's guilt or innocence. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

Giving of "Allen charge" prior to September 22, 1971, held not error. *People v. Lovato*, 181 Colo. 99, 507 P.2d 860 (1973).

But error when no confusion in jurors' minds on the law. Ordinarily a trial judge is within his rightful province when he urges agreement upon a jury at loggerheads with itself; but this process has its limits, and it is a specifically delicate matter to importune unanimity when there is no indication of confusion or misapprehension in the minds of the jurors on the law of the case. *Mogan v. People*, 157 Colo. 395, 402 P.2d 928 (1965).

"Time-fuse" instruction is plain error. The giving of a "time-fuse" instruction (which grants the jury a time limit to finish its deliberations, at the end of which the jury will be dismissed) constitutes plain error and requires reversal. *Allen v. People*, 660 P.2d 896 (Colo. 1983).

Instruction that the jury could consider defendant's voluntary absence from the trial as evidence of guilt was not error. The court had made reasonable inquiry as to the defendant's whereabouts before continuing the trial. *People v. Tafoya*, 833 P.2d 841 (Colo. App. 1992).

V. MOTION FOR NEW TRIAL.

Failure to comply with this rule will ordinarily result being precluded from raising an objection for the first time on motion for new trial. *Arellano v. People*, 177 Colo. 286, 493 P.2d 1362 (1972); *Fresquez v. People*, 178 Colo. 220, 497 P.2d 1246 (1972).

Where grounds specified in motion are not the same as before court. Where the "grounds so specified" before the trial court are not the same as are thereafter urged in a motion for new trial, then the grounds may not be considered raised for the first time in the motion for a new trial. *Zeiler v. People*, 157 Colo. 332, 403 P.2d 439 (1965).

VI. ON REVIEW.

A. In General.

Errors in instructions generally not basis for collateral attack. As a general rule, errors in jury instructions do not constitute fundamental error that would provide a basis for collateral attack. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

Assumption that jury followed instructions. The reviewing court must assume, in the absence of evidence to the contrary, that the jury followed the court's instructions. *People v. Palmer*, 189 Colo. 354, 540 P.2d 341 (1975); *People v. Montoya*, 709 P.2d 58 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 1208 (Colo. 1987).

And that court properly instructed jury. On review, in the absence of all of the instructions, it will be assumed that the trial court properly instructed the jury on the law applicable to the facts and the issues. *Luna v. People*, 170 Colo. 1, 461 P.2d 724 (1969).

Error benefiting party not prejudicial. Where one is benefited by an error in submitting or failing to submit an instruction, he cannot claim prejudicial error. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

A party cannot complain when an instruction given is more favorable to him than the one refused. *Lowdermilk v. People*, 70 Colo. 459, 202 P. 118 (1921); *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

Where a court errs in giving an instruction that prejudices the state rather than the defendant in that it increases the state's burden beyond that required, no grounds for reversal are created. *Early v. People*, 178 Colo. 167, 496 P.2d 1021 (1972).

No error where instructions support defendant's theory. Defendant cannot try the case on one theory and claim error on appeal where the trial court, in instructing the jury, acquiesced in that theory. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Or where approved by defense. Assignments of error based on instructions specifically approved by the defense will not be considered. *Giacomozzi v. People*, 72 Colo. 13, 209 P. 798 (1922).

No error where defendant acquitted. Where the requested instructions went only to the question of a charge of which the defendant was acquitted, the refusal to give the instructions is not subject to review. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

Mere nondirection where no instruction is requested is not error. *Brown v. People*, 20 Colo. 161, 36 P. 1040 (1894); *West v. People*, 60 Colo. 488, 156 P. 137 (1915); *Clarke v. People*, 64 Colo. 164, 171 P. 69 (1918); *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

In reviewing claims based on clerical errors in instructions, the court must assume that the jury took a common sense view of the instruction. *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

For court to determine the effect of particular instruction, it must be read in conjunction with the other instructions. *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989).

Under the doctrine of invited error, a party cannot complain where he has been the instrument for injecting error in the case, and any error caused by the failure of the trial court to give the jury an instruction due to the defendant's objections is error injected by the defendant and cannot be complained of on appeal. *People v. Collins*, 730 P.2d 293 (Colo. 1986).

When a party injects or invites error in trial proceedings, he cannot later seek reversal on appeal because of that error. *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989).

A claim of plain error relative to a jury instruction must be tested by examining the sufficiency of the instructions as a whole. *People v. Turner*, 730 P. 2d 333 (Colo. App. 1986).

The cumulative effect of improper jury instructions that contained erroneous statements of law which relegated to the jury the function of determining whether an affirmative defense was available in a case and which had the effect of relieving the prosecution of its burden of proof in regard to the affirmative defense was plain error even though a proper jury instruction was provided with the improper jury instruction. The proper jury instruction was insufficient to dispel the potential harm created by the erroneous jury instructions. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Failure to instruct jury on element not necessarily structural, requiring reversal. If element uncontested, supported by overwhelming evidence, and jury verdict would have been same absent error, failure to instruct harmless. *People v. Geisendorfer*, 991 P.2d 308 (Colo. App. 1999).

A trial court commits constitutional error when it correctly instructs the jury regarding the elements of the crime but instructs the jury that, as a matter of law, the prosecution has satisfied its burden of proving one of the elements, thereby withdrawing that element from the jury's consideration. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

B. Requirements.

Failure to object at trial bars review. Where appellants argue that certain of the instructions given were erroneous, but they failed to raise any objection to these instructions at trial, offered no alternative instructions, and

then failed to raise the issue in their motion for a new trial, an appellate court will not ordinarily review the assignment of error. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972). See *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968); *Tanksley v. People*, 171 Colo. 77, 464 P.2d 862 (1970).

Trial counsel must specify which instructions he is objecting to and tender correct instructions, and having failed to so object at trial, the issue cannot be raised on appeal. *People v. Green*, 183 Colo. 25, 514 P.2d 769 (1973).

Where defendant did not object to the jury instruction, nor offer a substitute, or include the asserted ground in his motion for new trial, consequently, it will not be considered for the first time on appeal. *Lamb v. People*, 181 Colo. 446, 509 P.2d 1267 (1973).

An appellate court ordinarily does not notice objections to instructions not raised at the trial court level. *Keady v. People*, 32 Colo. 57, 74 P. 892 (1903); *Buschman v. People*, 80 Colo. 173, 249 P. 652 (1926); *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968).

Ordinarily, the supreme court will not take note of erroneous instructions in the absence of a contemporaneous objection which gives the trial court an opportunity to correct error in its proceedings. *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974).

Unless manifest prejudice amounting to plain error. Where the defendant does not object to an instruction given, or tender any alternate instruction which might more adequately set forth the law, his assignment of error is not valid unless there is manifest prejudice amounting to plain error. *People v. Bercillio*, 179 Colo. 383, 500 P.2d 975 (1972).

Where defendant did not tender his own instructions, nor did he object to the instructions given, nor did he raise objections to the instructions in his motion for a new trial, a reviewing court is not required to review the arguments raised for the first time, and would not do so unless fundamental error appears. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Where a defendant failed to object to the adequacy of the jury instructions in his motion for a new trial, a judgment will not be reversed unless plain error occurred. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

Where defendant only made a general objection to jury instructions, and failed to make a timely specific objection, supreme court will not consider argument by defendant that instructions were in error, absent plain error. *People v. O'Donnell*, 184 Colo. 104, 518 P.2d 945 (1974).

Where the defendant failed to make any objection prior to submission of the instructions, absent plain error, the court would not consider the defendant's arguments on review. *People v.*

Tilley, 184 Colo. 424, 520 P.2d 1046 (1974); *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Where defendant did not challenge the giving of the instruction at trial, only error so substantial as to constitute plain error requires reversal. *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

Within the meaning of rule 52. Review as to an alleged error not previously specified to the trial court is precluded unless the alleged error be deemed "plain error" within the meaning of Crim. P. 52(b). *People v. Brionez*, 39 Colo. App. 396, 570 P.2d 1296 (1977).

"Plain error" rule must be read in harmony with this rule. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

Review confined to whether plain error present. Where an instruction issue is raised for the first time on appeal, review is confined to a consideration of whether the error falls within the definition of plain error. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972); *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991); *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

Where instructions used by the trial court fail to define the statutory terms, failure to object to the tendered instructions or raise any constitutional objection to the statute at the trial court level raises the standard of review to one of "plain error". *People v. Cardenas*, 42 Colo. App. 61, 592 P.2d 1348 (1979).

Appellate court reviews only for plain error where defendant fails to make all objections to the jury instructions before the instructions are submitted to the jury. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

No plain error where a reasonable jury would not interpret the instructions to permit two aggravated robbery convictions where defendant took property from only one victim during a single episode. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

"Plain error" not found. Where an instruction is not objected to by defendant when tendered by the court, the defendant does not tender a "proper" instruction, and he does not mention the asserted error in instruction in a motion for new trial, there is no plain error. *People v. Green*, 178 Colo. 77, 495 P.2d 549 (1972).

Where from the court's review of all instructions it was satisfied that there was no "plain error" in the giving of the instruction which the defendant challenged for the first time on appeal, there was no need to discuss the several arguments advanced by the defendant. *People v. Spinuzzi*, 184 Colo. 412, 520 P.2d 1043 (1974).

Broad objection insufficient for review. An objection in broad coverage, giving no basis whatever to point up with some reasonable particularity the nature of any shortcoming, is no objection at all and is not entitled to consideration on review. *Cruz v. People*, 165 Colo. 495, 441 P.2d 22 (1968).

Where a great number of instructions are given, most of them dependent to some extent on each other, then, where they are full and fair to the defendant in a criminal case by stating the law correctly, an appellate court will not review them, or any part of them, upon a vague and general charge of error. *Jones v. People*, 6 Colo. 452, 45 Am. R. 526 (1882).

Where instructions are given as a general charge and the exceptions are only general in their character, the party excepting is not in position to urge his objection on appeal. *Liggett v. People*, 26 Colo. 364, 58 P. 144 (1899).

Refusal to give instruction not error if no prejudice. The court's refusal to give defendant's tendered instruction is not error where no prejudice to defendant is shown or apparent in record. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972).

Jury instruction that if defendant was found to be the initial aggressor he was not entitled to benefit of self-defense was harm-

less error. There was no real possibility the jury was misled and the instruction was at most cumulative of another instruction concerning self-defense. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Where record does not disclose any request during trial for the submission to the jury of a question, an appellate court declines to pass on the question of error in failure to submit. *McClary v. People*, 79 Colo. 205, 245 P. 491 (1926); *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

No error in trial court's instruction on deadly weapon or in court's response to jury's question on deadly weapon where defense did not object to the instruction or tender an alternative instruction or object to the court's referral to the instruction in answering the question, and, in some circumstances, fists may be considered a deadly weapon. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Jury instruction providing supplemental definition of "knowing" for the purposes of second degree murder was unnecessary, but was not reversible error. The trial court's instruction did not pose a barrier to the jury in considering fully the defendant's affirmative defense. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Rule 31. Verdict

(a) Submission and Finding.

(1) **Forms of Verdict.** Before the jury retires the court shall submit to it written forms of verdict for its consideration.

(2) **Retirement of Jury.** When the jury retires to consider its verdict, the bailiff shall be sworn or affirmed to conduct the jury to some private and convenient place, and to the best of his ability to keep the jurors together until they have agreed upon a verdict. The bailiff shall not speak to any juror about the case except to ask if a verdict has been reached, nor shall he allow others to speak to the jurors. When they have agreed upon a verdict, the bailiff shall return the jury into court. However, in any case except where the punishment may be death or life imprisonment, the court, upon stipulation of counsel for all parties, may order that if the jury should agree upon a verdict during the recess or adjournment of court for the day, it shall seal its verdict, to be retained by the foreman and delivered by the jury to the judge at the opening of the court, and that thereupon the jury may separate, to meet in the jury box at the opening of court. Such a sealed verdict may be received by the court as the lawful verdict of the jury.

(3) **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

(b) Several Defendants.

If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Lesser Offense.

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury.

When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

ANNOTATION

- I. General Consideration.
- II. Submission and Finding.
 - A. Forms of Verdict.
 - B. Retirement of Jury.
 - C. Return.
- III. Conviction of Lesser Offense.
- IV. Poll of Jury.

I. GENERAL CONSIDERATION.

Jury's verdict must be allowed to stand if supported by substantial evidence. *People v. Chavez*, 182 Colo. 216, 511 P.2d 883 (1973).

Appellate courts cannot direct entry of directed verdicts of guilt. *People v. Smith*, 181 Colo. 203, 510 P.2d 315 (1973).

Applied in *People v. Morris*, 190 Colo. 215, 545 P.2d 151 (1976); *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

II. SUBMISSION AND FINDING.

A. Forms of Verdict.

Where the crime charged can be committed in alternative ways, the written verdict form should not lump the ways together in the disjunctive or conjunctive, although the charge in the statute may be made in the disjunctive and the charge in the information may be made in the conjunctive. *Hernandez v. People*, 156 Colo. 23, 396 P.2d 952 (1964).

Separate verdicts should be submitted or else there should be a general verdict given as a counterpart of the not guilty verdict, since evidence of any of the alternative ways a crime can be committed will support a general verdict. *Hernandez v. People*, 156 Colo. 23, 396 P.2d 952 (1964).

B. Retirement of Jury.

All communications should be made in open court with the parties afforded an opportunity to make timely objections to any action by the court or jury which might be deemed irregular. *Barriner v. District Court*, 174 Colo. 447, 484 P.2d 774 (1971).

Informal communications improper. Informal communications between the court and jury via the bailiff are improper. *Barriner v. District Court*, 174 Colo. 447, 484 P.2d 774 (1971).

Prejudice required to set aside verdict for improper jury communication. In order to

constitute grounds for setting aside verdict because of unauthorized or improper communication with the jury, the defendant must show that he was prejudiced thereby. *People v. Davis*, 183 Colo. 228, 516 P.2d 120 (1973).

Informal communication between court and jury must be examined in order to determine whether it is prejudicial. *Ray v. People*, 147 Colo. 587, 364 P.2d 578 (1961).

Determination of prejudice within court's discretion. The determination of whether prejudice has occurred because of unauthorized or improper communication with the jury is within the sound discretion of the trial court, and only where that discretion has been abused will the verdict be set aside and a new trial ordered. *People v. Davis*, 183 Colo. 228, 516 P.2d 120 (1973).

Communication without prejudice not reversible error. Where the communication does not disclose that any prejudice whatever resulted to defendants, such communication between court and jury does not constitute reversible error. *Ray v. People*, 147 Colo. 587, 364 P.2d 578 (1961).

This rule must receive a reasonable construction as prohibiting only communications of an improper or unnecessary character. *McLean v. People*, 66 Colo. 486, 180 P. 676 (1919).

Ordinary physical necessities of jurors must be provided for. *McLean v. People*, 66 Colo. 486, 180 P. 676 (1919).

Where trial testimony is read to the jury at its request during its deliberations, it is essential that the court observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury, for this would be prejudicial abuse of discretion and constitute grounds for reversal. *Settle v. People*, 180 Colo. 262, 504 P.2d 680 (1972).

Such reading is discretionary with trial court. The overwhelming weight of authority is that the reading of all or part of the testimony of one or more of the witnesses at trial, criminal or civil, at the specific request of the jury during its deliberations is discretionary with the trial court. *Settle v. People*, 180 Colo. 262, 504 P.2d 680 (1972).

Court must determine whether jury is deadlocked. The trial court fails to exercise its power with that degree of caution which the circumstances demand where it fails to determine as a matter of fact that the jury is hope-

lessly deadlocked immediately before its discharge. *Barriner v. District Court*, 174 Colo. 447, 484 P.2d 774 (1971).

When "consent" to discharge deemed invalid. Defendant's "consent" to the discharge of the jury has no force or validity where the conditions and assumptions upon which the consent is based are never legally met, such as where defendant agreed to a future situation where the jury was "hopelessly deadlocked" when he had a right to anticipate that the court would follow the usual procedures in discharging a jury, and not the declaration of a mistrial based upon hearsay and procedural violations of the bailiff done totally off the record and out of court where no objection to the procedure was possible. *Barriner v. District Court*, 174 Colo. 447, 484 P.2d 774 (1971).

C. Return.

Verdict in a criminal case should be certain and devoid of ambiguity, though it need not follow strict rules of pleading or be otherwise technical. *Yeager v. People*, 170 Colo. 405, 462 P.2d 487 (1969).

Else conviction will not stand. When the language of the verdict permits reasonable uncertainty, defendant's conviction cannot be permitted to stand. *Yeager v. People*, 170 Colo. 405, 462 P.2d 487 (1969).

Sealed verdict must be returned the next juridical day. Where the parties stipulated that the court direct the jury to the effect that should they agree upon a verdict during the recess or adjournment of court for the day, the jury should seal their verdict and thereafter, in the absence of defendant and his counsel, and without their knowledge, the court instructed the jury to return verdict one week later instead of the next juridical day, as this rule contemplates, such practice was improper. *Denny v. People*, 106 Colo. 328, 104 P.2d 610 (1940).

Unanimity is required only with respect to the ultimate issue of defendant's guilt or innocence of the crime charged and not with respect to alternative means by which the crime was committed. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Vigil*, 678 P.2d 554 (Colo. App. 1983).

Unanimity in a verdict does not require the jurors to be in agreement as to specific elements of the crime. *People v. Lewis*, 710 P.2d 1110 (Colo. App. 1985).

Where the intent of the jury can be ascertained from the verdict forms submitted, there is no reversible error as a result of the omission of a reference to conspiracy in the guilty verdict form. *People v. Roberts*, 705 P.2d 1030 (Colo. App. 1985).

Jury verdicts will not be reversed for inconsistency when the crimes charged required different elements of proof, and the jury could

find from the very same evidence that the element of one crime was present while at the same time finding that the element of another charged crime was absent. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

No error in the trial court's decision to reassemble the jury for further deliberation and to enter judgment on the amended verdict where facts were insufficient to support a presumption that the jury was open to the influence of others after discharge and the defendant did not request that the jurors be questioned about their contact with others during the brief period after discharge. *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

Court properly instructed jury to resume deliberations where juror's statements were ambiguous and equivocal as to her concurrence in the verdict. *People v. Barnard*, 12 P.3d 290 (Colo. App. 2000).

III. CONVICTION OF LESSER OFFENSE.

Lesser included offense defined. If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

"The offense charged" as used in section (c), encompasses any lesser included offense of the one charged. *Hunter v. District Court*, 184 Colo. 238, 519 P.2d 941 (1974).

Provisions of section (c) are embodiments of the rule at common law that the defendant was presumed to be on notice that he could be convicted of the crime charged or a lesser offense included therein. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

Section (c) and all prior Colorado case law provide that one may be convicted of a lesser included offense of the crime charged. *Hunter v. District Court*, 184 Colo. 238, 519 P.2d 941 (1974).

If appellate court reverses a conviction as to a greater offense for insufficient evidence, it may direct entry of judgment on a lesser included offense supported by sufficient proof, even if jury was not instructed upon that lesser offense. *People v. Valdez*, 56 P.3d 1148 (Colo. App. 2002).

A criminal defendant who maintains his or her innocence at trial is not automatically barred from seeking jury instructions for a voluntary intoxication defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no rational basis in the evidence for the voluntary

intoxication instruction. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

Claim of innocence alone does not disentitle defendant to lesser included offense instruction. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

IV. POLL OF JURY.

A court may declare a mistrial without further questioning the jury if the record supports the determination that the jury is unlikely to reach a unanimous verdict. Section (d) specifically applies "when a verdict is returned" and contains no direction to poll jurors prior to a verdict. Although the rule contemplates that a juror may disagree with a verdict, thereby permitting the court to direct further deliberations or to discharge the jury, the rule contains no provision for the situation

where the jury reports that it cannot, and likely will not, reach a verdict. *People v. Rivers*, 70 P.3d 531 (Colo. App. 2002).

A jury poll ordinarily requires each juror to assent in the verdict. However, the right to a jury poll is not absolute, and matters relating to the manner of conducting a jury poll are generally committed to the discretion of the trial court. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

Trial court properly refused defendant's request to poll the jury. If a single charge includes multiple degrees of offenses, the trial court may not conduct a partial verdict inquiry as to the offenses included within the charge. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Where no contemporaneous objection is made to an asserted defect occurring during the polling of the jury, review on appeal is limited to whether the defect rises to the level of ordinary plain error. Because the jurors in the case orally informed the court of their unanimous verdict and the record did not show a lack of unanimity, the court perceived no plain error where twelfth juror inexplicably not polled. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Presentence or Probation Investigation.

(1) When and How Made. In any felony case where the court has discretion as to the punishment and on court order in any misdemeanor case, the probation officer shall make an investigation and written report to the court before the imposition of sentence or granting of probation.

An application for probation shall be in writing upon forms furnished by the court, but when the defendant has been convicted of a misdemeanor or class 1 petty offense, the court, in its discretion, may waive the written application for probation.

The court, upon its own motion or upon the petition of the probation officer, may order any defendant who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence examination and report unless a presentence report is required by statute, including but not limited to the requirements of section 16-11-102(1)(b).

(2) Report. The presentence report shall include, but not be limited to, information as to the defendant's family background, educational history, employment record, and past criminal record, an evaluation of the alternative dispositions available for the defendant, and such other information as the court may require. In addition, the court, as it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted mental and physical examination of the defendant. Within a reasonable time prior to sentencing, copies of the presentence report, including any recommendations as to probation, shall be furnished to the prosecuting attorney and defense counsel or to the defendant if the defendant is unrepresented. The report shall also include a statement showing the amount of time during which the defendant was confined prior to the imposition of sentence for the offense for which the defendant is being sentenced.

(b) Sentence and judgment.

(1) Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf, and to present any information in mitigation of punishment. The state also shall be given an opportunity to be heard on any matter material to the imposition of sentence. Alternatives in sentencing shall be as provided by law.

(2) Upon conviction of guilt of a defendant of a class 1 felony, and after the sentencing hearing provided by law, the trial court shall impose such sentence as is authorized by law. At the time of imposition of a sentence of death, the trial court shall enter an order staying execution of the judgment and sentence until further order of the Supreme Court.

(3) **Judgment.** A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, the finding of the amount of presentence confinement, and costs, if any are assessed against the defendant, the finding of the amount of earned time credit if the defendant had previously been placed in a community corrections program, and a statement that the defendant is required to register as a sex offender, if applicable.

(c) **Advisement.** Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.

Where judgment of conviction has been entered following a plea of guilty or nolo contendere, the court shall, after passing sentence, inform the defendant that the defendant may in certain circumstances have the right to appellate review of the sentence, of the time limits for filing a notice of appeal, and that the defendant may have a right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

(d) **Withdrawal of Plea of Guilty or Nolo Contendere.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended.

If the court decides that the final disposition should not include the charge or sentence concessions contemplated by a plea agreement, as provided in Rule 11(f) of these Rules, the court shall so advise the defendant and the district attorney and then call upon the defendant to either affirm or withdraw the plea of guilty or nolo contendere.

(e) **Criteria for Granting Probation.** The court in its discretion may grant probation to a defendant unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public.

The conditions of probation shall be as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

(f) Proceedings for Revocation of Probation.

(1) At the first appearance of the probationer in court, or at the commencement of the hearing, whichever is first in time, the court shall advise the probationer as provided in Rule 5(2)(I) through (VI) of these Rules insofar as such matters are applicable, except that there shall be no right to a trial by jury in proceedings for revocation of probation.

(2) At or prior to the commencement of the hearing, the court shall advise the probationer of the charges against the probationer and the possible penalty or penalties therefor, and shall require the probationer to admit or deny the charges.

(3) At the hearing, the prosecution shall have the burden of establishing by a preponderance of the evidence the violation of a condition or conditions of probation, except that the commission of a criminal offense must be established beyond a reasonable doubt unless the probationer has been convicted thereof in a criminal proceeding. The court may, when it appears that the alleged violation of conditions of probation consists of an offense with which the probationer is charged in a criminal proceeding then pending, continue the probation revocation hearing until the termination of such criminal proceeding. Any evidence having probative value shall be received regardless of its admissibility under the exclusionary rules of evidence if the defendant is accorded a fair opportunity to rebut the evidence.

(4) If the probationer is in custody, the hearing shall be held within 14 days after the filing of the complaint, unless delay or continuance is granted by the court at the instance or request of the probationer or for other good cause found by the court justifying further delay.

(5) If the court determines that a violation of a condition or conditions of probation has been committed, it shall within 7 days after the said hearing either revoke or continue the probation. In the event probation is revoked, the court may then impose any sentence, including probation which might originally have been imposed or granted.

Source: (a)(2), (b) to (e), and (f)(2) amended and adopted September 7, 2006, effective January 1, 2007; (a)(1) amended and effective October 18, 2007; (f)(4) and (f)(5) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Presentence or Probation Investigation.
- III. Sentence.
- IV. Judgment.
- V. Withdrawal of Plea of Guilty or Nolo Contendere.
 - A. In General.
 - B. Sentence Concessions.
- VI. Revocation of Probation.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Insanity and the Law", see 39 *Dicta* 325 (1962). For article, "Colorado Felony Sentencing", see 11 *Colo. Law.* 1478 (1982). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a recent case relating to increased sentences after retrial, see 15 *Colo. Law.* 1604 (1986).

This rule is not unconstitutional because notice of a right to review is given to criminal defendants except in cases where judgment of conviction has been entered following a plea of guilty or nolo contendere. The reasonableness of the classification of defendants who have entered guilty pleas has been upheld in cases dealing with the federal counterpart. *People v. Smith*, 190 *Colo.* 449, 548 P.2d 603 (1976).

A violation of this rule does not entitle defendant to a late appeal in the absence of prejudice. In order for the defendant to bring a claim alleging he or she was deprived of the right to appeal because the court failed to com-

ply with this rule, the defendant must bring a timely postconviction action under *Crim. P.* 35(c) and request a remedy of a new appeal. *People v. Boespflug*, 107 P.3d 1118 (*Colo. App.* 2004).

Applied in *McClendon v. People*, 175 *Colo.* 451, 488 P.2d 556 (1971); *People v. Banks*, 190 *Colo.* 295, 545 P.2d 1356 (1976); *People v. District Court*, 191 *Colo.* 558, 554 P.2d 1105 (1976); *People v. Houpe*, 41 *Colo. App.* 253, 586 P.2d 241 (1978); *People v. Palmer*, 42 *Colo. App.* 460, 595 P.2d 1060 (1979); *People v. Baca*, 44 *Colo. App.* 167, 610 P.2d 1083 (1980); *People v. Horton*, 628 P.2d 117 (*Colo. App.* 1980); *People v. Quintana*, 634 P.2d 413 (*Colo.* 1981); *People v. Lawson*, 634 P.2d 1019 (*Colo. App.* 1981); *Hafelfinger v. District Court*, 674 P.2d 375 (*Colo.* 1984); *People v. Anderson*, 703 P.2d 650 (*Colo. App.* 1985).

II. PRESENTENCE OR PROBATION INVESTIGATION.

Even where evidence has been illegally seized, its use in a presentence hearing following a guilty plea is not error. *Von Pickrell v. People*, 163 *Colo.* 591, 431 P.2d 1003 (1967).

III. SENTENCE.

Equal protection requirements. In the context of sentencing for criminal offenses, equal protection requires only that those who have committed the same offense shall be subject to the same criminal sanctions in effect at the time

the offense was committed. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974).

Imposition of sentence requires judicial discretion. The imposition of a criminal sentence in each individual case requires the exercise of judicial judgment, and it includes consideration of mitigating and aggravating circumstances, the power to impose an indeterminate sentence, and the right to suspend sentence, or the discretion to grant probation in appropriate cases. *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972).

Which does not deny equal protection. The exercise of the judge's discretionary power in sentencing does not deny an accused equal protection of the law. *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972).

Substance of American Bar Association standards deemed "authorized by law". The substance of the principles articulated in the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 3.5, insofar as they are consistent with the stated general purposes of the Colorado code of criminal procedure, may be deemed to be "authorized by law" within the meaning of section (b). *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977).

Nothing requires court to assign reasons for imposing a sentence. *People v. Pauldino*, 187 Colo. 61, 528 P.2d 384 (1974).

A sentencing court is required to state on the record the basic reasons for the imposition of sentence. The failure to do so creates a burdensome obstacle to effective and meaningful appellate review. *People v. Luu*, 983 P.2d 15 (Colo. App. 1998).

A judgment of conviction is not final until sentence is imposed. Absent a specific finding that the victim did not suffer a pecuniary loss, restitution is a mandatory part of a sentence. Thus, absent such a finding, sentencing is not final until restitution is ordered. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

Discretion to impose concurrent or consecutive sentence. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon the defendant. *People v. Garcia*, 658 P.2d 1383 (Colo. App. 1983); *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Delaying final sentencing on non-capital convictions until after sentencing on class 1 felony is appropriate where a court must sentence both for a class 1 felony and for other felonies. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Six-year delay between defendant's conviction and legal sentencing did not divest court of jurisdiction or cause unreasonable delay, where the sentence was promptly imposed following defendant's conviction, but subsequent appeal and the defendant's election

to invoke the discretionary procedure under the Sex Offender's Act of 1968 delayed the proceedings. *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996).

When court delays sentencing so that another case against defendant may be resolved that would allow the court to increase the sentence in case before the court, the court violates the requirement to impose sentence without "unreasonable delay". The delay in this case allowed the court to double the defendant's sentence which was substantial error that undermined the fundamental fairness of defendant's sentencing. *People v. Sandoval-Candelaria*, __ P.3d __ (Colo. App. 2011).

Single sentence for more than one conviction does not constitute reversible error, although the preferable practice is to have a separate sentence for each conviction. *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973).

Reliance by court on probation report at time sentence imposed does not abuse the defendant's rights. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Judge may consider truthfulness of voluntary statements. It is not a denial of due process for a judge, in connection with sentencing procedure, to consider the truthfulness of voluntary statements made by the defendant at a presentence hearing. *People v. Quarles*, 182 Colo. 321, 512 P.2d 1240 (1973).

Deferred prosecution is relevant consideration in determining the sentence. *People v. Lichtenwalter*, 184 Colo. 340, 520 P.2d 583 (1974).

There is no difference between plea of nolo contendere and plea of guilty for sentencing purposes. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

There is no requirement that codefendants be given equal sentences. *People v. Martin*, 670 P.2d 22 (Colo. App. 1983).

Sentencing court should tailor sentence to defendant, keeping in mind past record, potential for rehabilitation, and protection of the public as well. *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975).

Sentencing court should attempt to tailor the sentence to the defendant. To achieve this goal, the court should be aware of defendant's entire record including his past encounters with the criminal justice system. *People v. Lichtenwalter*, 184 Colo. 340, 520 P.2d 583 (1974).

Defendant must be notified when sentence will be pronounced. He has a right to be present in the court with legal counsel at that time, and he has a right of allocution before sentence is handed down which cannot be withheld from him. The failure of the court to properly insure these rights of a defendant renders invalid a

sentence pronounced under those circumstances. *People v. Emig*, 177 Colo. 174, 493 P.2d 368 (1972).

No right to evidentiary hearing. During a discretionary sentencing proceeding, rule does not require an evidentiary hearing on the validity of any prior conviction contained in a presentence report. *People v. Padilla*, 907 P.2d 601 (Colo. 1995).

Prior to sentencing, the court must grant the defendant an opportunity to make a statement on his or her own behalf. The proper remedy for failing to allow the defendant to make a statement is resentencing. *People v. Marquante*, 923 P.2d 180 (Colo. App. 1995).

Effect of denial of allocution limited. Denial of the right of allocution under section (b) has no effect on the validity of the jury's determination of guilt. *People v. Doyle*, 193 Colo. 332, 565 P.2d 944 (1977).

Relief from denial is resentencing. The defendant's relief from a denial of the right of allocution under section (b) is resentencing after being afforded his right to allocution. *People v. Doyle*, 193 Colo. 332, 565 P.2d 944 (1977).

Where the presentence report is issued to counsel immediately prior to sentencing, and the trial court's refusal to continue the sentencing hearing to another day unduly abridges the defendant's rights to present evidence in rebuttal to the information and recommendations contained in the report, his sentence must be vacated and the case remanded for resentencing after a full sentencing hearing. *People v. Wright*, 672 P.2d 518 (Colo. 1983).

However, the right of allocution is a statutory right, not a constitutional one, and reversal is not required if the failure to provide the defendant an opportunity to make a statement prior to sentencing is harmless. If a trial court imposes the minimum sentence permitted and does not have discretion to impose a lesser sentence, the lack of statement in allocution does not affect the sentence and is harmless. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Sentencing must occur without unreasonable delay. Although the general assembly has prescribed no specific time within which sentence must be imposed, section (b) requires that sentencing occur without unreasonable delay. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

Although sentencing was delayed for eight years, delay was excusable because the majority of it was attributable to defendant's own actions. *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

Although resentencing was delayed for 29 months, delay was excusable because of the timely imposition of defendant's original sentence, the substantial reduction of the original sentence upon resentencing, the consequent

lack of prejudice resulting from the sentence imposed on remand, and the fact that all of the period of delay would be credited against the present sentence. *People v. Luu*, 983 P.2d 15 (Colo. App. 1998).

Despite six-year delay, state had no duty to set defendant's probation revocation hearing until after termination of defendant's incarceration in another jurisdiction. *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

One-year deferral of sentence imposition is unreasonable delay. Absent a legally justifiable reason, a one-year deferral of imposition of sentence constitutes an unreasonable delay in sentencing contrary to section (b). *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

Sentence imposed within statutory limits will not be disturbed. Ordinarily if a sentence imposed is within limits fixed by statute, it will not be disturbed on review. *People v. Lutz*, 183 Colo. 312, 516 P.2d 1132 (1973).

Choice of place of confinement is within the sound discretion of the court. *People v. Weihs*, 187 Colo. 124, 529 P.2d 317 (1974).

Length of term of imprisonment is within the discretion of the court. *People v. Weihs*, 187 Colo. 124, 529 P.2d 317 (1974).

Sentencing judge is empowered to set the minimum sentence. *Guerin v. Fullerton*, 154 Colo. 142, 389 P.2d 84 (1964).

Parole board has no authority to refuse to carry out the plain meaning of a sentence legally imposed by the sentencing judge. *Guerin v. Fullerton*, 154 Colo. 142, 389 P.2d 84 (1964).

There is no constitutional right to credit of presentence jail time against sentence imposed. *People v. Coy*, 181 Colo. 393, 509 P.2d 1239 (1973); *People v. Nelson*, 182 Colo. 1, 510 P.2d 441 (1973).

Presumption that court gave credit for presentence confinement. It will be conclusively presumed that the trial court gave credit for presentence time spent in confinement where the sentence imposed plus the prior time in confinement do not exceed the maximum possible sentence. *Larkin v. People*, 177 Colo. 156, 493 P.2d 1 (1972).

Or otherwise acted properly. Where sentencing judge states only that he is taking time spent in jail prior to sentencing into consideration and thereafter gives the maximum, it must be presumed that he acted properly; that is, that he took the time spent into consideration and determined, as he had the right to do, not to grant the credit. *People v. Nelson*, 182 Colo. 1, 510 P.2d 441 (1973).

But "giving credit" without applying it to sentence improper. Where the trial court in sentencing gives credit to the defendant for his presentence jail time but does not apply it to the maximum sentence, the court is, in fact, extending the sentence beyond the statutory limits.

People v. Regan, 176 Colo. 59, 489 P.2d 194 (1971).

Credit should be reflected in record. Trial judges would be well advised to follow the practice of causing the actual time spent by the defendant in jail prior to the imposition of sentence to be reflected in the record at the time sentence is imposed. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

Cancellation of deferred sentence does not affect conviction. Where the trial court withdrew or cancelled the imposition of the deferred sentence, its order affected only the sentence, and did not touch the conviction. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980).

Defendant's absence from the state was by virtue of his own conduct and was justifiable reason for delay in sentencing. Defendant was incarcerated in another state for a probation violation. *People v. Gould*, 844 P.2d 1273 (Colo. App. 1992).

Two and one-half month delay in sentencing following defendant's return to state was not unreasonable. *People v. Gould*, 844 P.2d 1273 (Colo. App. 1992).

IV. JUDGMENT.

Intent of section (c). The intent behind section (c) is to establish some minimum guarantee that knowledge of the appellate process will be conveyed to defendants. *People v. Boivin*, 632 P.2d 1038 (Colo. App. 1981).

Burden to show that defendant was advised of appellate rights. Once there is sufficient reason to believe that the trial court has not advised a defendant of his appellate rights, including the special rights of an indigent defendant, the burden falls upon the state to demonstrate that he was so advised. *People v. Boivin*, 632 P.2d 1038 (Colo. App. 1981).

No "finality" standard for double jeopardy purposes. Section (c) does not provide a standard of "finality" for purposes of the constitutional prohibition against being twice placed in jeopardy for the same offense. *People v. District Court*, 663 P.2d 616 (Colo. 1983).

For purposes of retroactive application of a new rule of law, a judgment of conviction in Colorado cannot be considered final so long as a defendant may directly appeal the conviction or sentence. *People v. Sharp*, 143 P.3d 1047 (Colo. App. 2005).

Oral order does not become final judgment until order signed and entered in the judgment record. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

When judgment final for purposes of appeal. The final judgment was entered, for purposes of appeal, when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal, taken more than 30

days after sentencing was proper. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

For purposes of § 16-5-402 and post-conviction review, a conviction occurs when the trial court enters judgment and sentence is imposed, if there is no appeal. The limitations of § 16-5-402 are applicable to a proportionality review of a sentence imposed pursuant to the habitual criminal statutes. *People v. Talley*, 934 P.2d 859 (Colo. App. 1996).

Judgment in a criminal case is not final until after sentencing. *Hellman v. Rhodes*, 741 P.2d 1258 (Colo. 1987).

An order of restitution becomes part of the sentence which, in accordance with section (c) of this rule, is part of the judgment of conviction. When a court orders a defendant, over his objection, to pay restitution to the victim or the victim's family as part of the judgment of conviction for a felony, the order of restitution is appealable pursuant to the statutory procedures applicable to the appellate review of a felony sentence. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Restitution component satisfied once ordered, even though specific amount not set until two years after sentence imposed. Once restitution ordered, although not set, judgment of conviction became final and appealable, even though district court retained jurisdiction to determine restitution amount. *Sanoff v. People*, 187 P.3d 576 (Colo. 2008).

Post-final judgment orders void when court denied defendant's motion for new trial and imposed valid sentence. *People v. Campbell*, 738 P.2d 1179 (Colo. 1987).

Constitutionality of imposing liability for costs. Statutes imposing liability for costs on a convicted defendant have been uniformly held to be constitutional. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

For effect of rule on habitual criminal act, see *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

V. WITHDRAWAL OF PLEA OF GUILTY OR NOLO CONTENDERE.

A. In General.

There is no ambiguity in this rule. *Glaser v. People*, 155 Colo. 504, 395 P.2d 461 (1964).

No right to withdraw guilty plea. One may not, as a matter of right, have his plea of guilty withdrawn or changed. *Maes v. People*, 155 Colo. 570, 396 P.2d 457 (1964); *McConnell v. People*, 157 Colo. 235, 402 P.2d 75 (1965).

Defendant does not have an absolute right to withdraw his guilty plea at any time before the court imposes sentence. *People v. Riley*, 187 Colo. 262, 529 P.2d 1312 (1975).

Defendant not permitted to withdraw plea of nolo contendere. Defendant's assertion of innocence at the time his plea of nolo contendere was entered does not force the court to permit him to withdraw his plea of nolo contendere. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Withdrawal of plea with court's discretion. An application for the withdrawal or change of such plea is addressed to the discretion of the trial court. *Maes v. People*, 155 Colo. 570, 396 P.2d 457 (1964); *Bradley v. People*, 175 Colo. 146, 485 P.2d 875 (1971).

And court's ruling on such an application will not be reversed, except where there is a clear abuse of discretion. *Maes v. People*, 155 Colo. 570, 396 P.2d 457 (1964); *Bradley v. People*, 175 Colo. 146, 485 P.2d 875 (1971); *People v. Miller*, 685 P.2d 233 (Colo. App. 1984).

Showing required to permit change of plea. To warrant the exercise of discretion favorable to a defendant concerning a change of plea, there must be some showing that justice will be subverted by a denial thereof, such as where a defendant may have been surprised or influenced into a plea of guilty when he had a defense, or where a plea of guilty was entered by mistake or under a misconception of the nature of the charge, or where such plea was entered through fear, fraud, or official misrepresentation, or where it was made involuntarily for some reason. *Maes v. People*, 155 Colo. 570, 396 P.2d 457 (1964); *Crumb v. People*, 230 P.3d 726 (Colo. 2010).

Defendant is entitled to withdraw plea of guilty where, at time plea was entered, neither court nor counsel was aware of defendant's parole status so defendant was improperly advised as to the minimum sentence, and where defendant promptly moved to withdraw guilty plea when parole status became known. *People v. Chippewa*, 751 P. 607 (Colo. 1988).

Court should not consider sentence it intends to impose as a reason for denying motion to withdraw a guilty plea where plea was entered when neither court nor counsel was aware of defendant's parole status so that defendant was improperly advised as to minimum sentence. *People v. Chippewa*, 751 P.2d 607 (Colo. 1988).

Defendant's motion to withdraw guilty plea must be granted where trial judge participated in plea negotiations. Because trial judge stepped out of his role as a neutral and impartial arbiter of justice by advising defendant and making other inappropriate remarks to influence defendant to agree to plea bargain, defendant has a fair and just reason to withdraw his plea. *Crumb v. People*, 230 P.3d 726 (Colo. 2010).

Defendant was entitled to a hearing on motion to withdraw guilty plea where court

understated minimum sentence that could be imposed and defendant's plea agreement was not in evidence. On remand, defendant must establish that his asserted belief that he would receive a sentence below the minimum sentence stated by the court was objectively reasonable. *People v. Hodge*, 205 P.3d 481 (Colo. App. 2008).

Right to allocution not denied where extensive pretrial inquiry did not support defendant's last minute assertion of inability to speak in English at sentencing hearing. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

When a defendant enters a plea agreement that includes a recommendation for a particular sentence, the fact that the sentence is rejected by the court removes the basis upon which the defendant entered his guilty plea and draws into question the voluntariness of the plea. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Case must be remanded to allow defendant the opportunity to affirm or withdraw his guilty plea where the trial court's rejection of the sentence recommendation contained in the plea agreement calls into question the voluntariness of that plea and the defendant had no opportunity to affirm or withdraw that plea. *People v. Walker*, 46 P.3d 495 (Colo. App. 2002).

When a defendant enters into a plea agreement that includes as a material element a recommendation for an illegal sentence and the illegal sentence is in fact imposed on the defendant, the guilty plea is invalid and must be vacated because the basis on which the defendant entered the plea included the impermissible inducement of an illegal sentence. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Where there is a valid plea agreement but an illegal sentence imposed to enforce the valid and legal plea, the proper remedy is to modify the sentence to effect the intent of the plea agreement. *People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000).

It is not an abuse of the court's discretion to deny a motion pursuant to this rule even though the defendant is influenced by alcohol at the time of entry of a plea of guilty if the court finds that the defendant still has the mental capacity to understand the entry of a plea of guilty. *People v. Lewis*, 849 P.2d 855 (Colo. App. 1992).

For a court to permit a defendant to withdraw his or her plea, there must be a fair and just reason. In this case, defendant's allegation of sentence misapprehension was contradicted by the record and the testimony of counsel, so there was no abuse of discretion in prohibiting defendant from withdrawing his plea. *People v. Allen*, __ P.3d __ (Colo. App. 2010).

A claim of ineffective assistance of counsel that is conclusory or contradicted by the record is not a fair and just reason for with-

drawing a guilty plea. *People v. Lopez*, 12 P.3d 869 (Colo. App. 2000).

Fair and just reason for withdrawal of guilty plea is established where, immediately upon learning of the potential deportation consequences, the defendant filed a motion to withdraw his guilty plea before sentencing and where prosecution did not allege any prejudice arising from the withdrawal. *People v. Luna*, 852 P.2d 1326 (Colo. App. 1993).

Defendant's motion to withdraw his guilty plea prior to sentencing without a hearing was duly denied, where defendant's expectation of a deferred sentence and judgment was merely a "wish and hope" that his counsel was unable to effectuate. *People v. DiGuglielmo*, 33 P.3d 1248 (Colo. App. 2001).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it related to the quality of his counsel was properly denied as successive under Crim. P. 35(c)(3)(VII), where lengthy evidentiary hearing was held on defendant's section 32(d) motion claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. *People v. Vondra*, 240 P.3d 493 (Colo. App. 2010).

B. Sentence Concessions.

Section (e) of this rule implements § 16-7-302 (2). *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Rule not limited to court-approved concessions. This rule, by its terms, is not limited to those situations where the court has first concurred in, or approved of, the sentence concessions. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

A sentence recommendation is a sentence concession whether or not the court approves or concurs. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

It is true that the district attorney has no authority to determine the sentence. However, sentence concessions must be equated with sentence recommendations; to hold otherwise would render the reference to sentence concessions in section (e) meaningless. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

The district attorney's agreement to recommend probation was a sentence concession contemplated by the plea agreement. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

But not all sentence concessions by the prosecution are sentence recommendations. *People v. Dawson*, 89 P.3d 447 (Colo. App. 2003).

"Sentence concessions" must refer only to the prosecution's making or not opposing favorable recommendations due to specific reference to Crim. P. 11(f). Prosecutor's agreement not to seek a sentence in the aggravated range does not constitute a sentence concession. *People v. Dawson*, 89 P.3d 447 (Colo. App. 2003).

Court must comply with section (e). Merely informing the defendant, pursuant to Crim. P. 11(b)(5) that the court will not be bound by any recommendation or representation by anyone concerning sentencing or probation does not obviate the necessity of its complying with section (e). *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Court is not bound by a recommendation; in its discretion it may refuse to grant the district attorney's sentence concession. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

When plea bargain rejected, plea is not voluntary. When the trial judge rejects the plea bargain he removes it as the basis for the sentence. When this occurs, the plea can hardly be characterized as voluntary. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

And defendant may withdraw plea. A defendant is permitted to withdraw his guilty plea where the trial court chooses not to follow the prosecutor's sentence recommendation, regardless of whether the prosecution has promised that the court will follow the recommendation. *People v. Wright*, 194 Colo. 448, 573 P.2d 551 (1978).

VI. REVOCATION OF PROBATION.

Power to alter sentence at time of revocation of probation is explicitly recognized in subsection (f)(5) of this rule, Crim. P. 35(a), and § 16-11-206 (5). *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

Review of probation revocation order. Probation revocation orders are not reviewable only via Crim. P. 35, but may be reviewed by direct appeal. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Issue preclusion does not apply to bar the right of a defendant to a trial where defendant had been charged with the crime of driving with a revoked license, which constituted both a violation of his probation and a new criminal act. Defendant did not have a full and fair opportunity to litigate the issue in the probation revocation hearing. A determination of guilt or innocence in a probation revocation hearing would undermine the function of the criminal trial process. *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

Probation revocation hearings are held for different purposes, governed by different procedures, and do not protect a defendant's rights as

does a criminal trial. *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

Rule 32.1. Death Penalty Sentencing Hearing

(a) **Purpose and Scope.** The purpose of this rule is to establish a uniform, expeditious procedure for conducting death penalty sentencing hearings in accordance with section 18-1.3-1201, 6 C.R.S.

(b) **Statement of Intention to Seek Death Penalty.** In any class 1 felony case in which the prosecution intends to seek the death penalty, the prosecuting attorney shall file a written statement of that intention with the trial court no later than 63 days (9 weeks) after arraignment and shall serve a copy of the statement on the defendant's attorney of record or the defendant if appearing pro se.

(c) **Date of Sentencing Hearing.** After a verdict of guilt to a class 1 felony, the trial judge shall set a date for the sentencing hearing. The sentencing hearing shall be held as soon as practicable following the trial.

(d) **Discovery Procedures for Sentencing Hearing.** The following discovery provisions shall apply to the death penalty sentencing hearing:

(1) **Aggravating Factors.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant, and file with the court a list of the aggravating factors enumerated at section 18-1.3-1201(5), 6 C.R.S., and that the prosecuting attorney intends to prove at the hearing.

(2) **Prosecution Witnesses.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant a list of the witnesses whom the prosecuting attorney may call at the sentencing hearing and shall promptly furnish the defendant with written notification of any such witnesses who subsequently become known or the materiality of whose testimony subsequently becomes known. Along with the name of the witness, the prosecuting attorney shall furnish the witness' address and date of birth, the subject matter of the witness' testimony, and any written or recorded statement of that witness, including notes.

(3) **Prosecution Books, Papers, Documents.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant a list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the prosecuting attorney may introduce at the sentencing hearing and shall promptly furnish the defendant written notification of additional such items as they become known.

(4) **Prosecution Experts.** As soon as practicable but not later than 63 days (9 weeks) before trial, the prosecuting attorney shall provide to the defendant any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any experts whom the prosecuting attorney intends to call as a witness at the sentencing hearing and shall promptly furnish the defendant additional such items as they become available.

(5) **Material Favorable to the Accused.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall make available to the defendant any material or information within the prosecuting attorney's possession or control that would tend to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing, and the prosecuting attorney shall promptly make available to the defendant any such material or information that subsequently comes into the prosecuting attorney's possession or control.

(6) **Prosecution's Rebuttal Witnesses.** Upon receipt of the information required by subsection (7), the prosecuting attorney shall notify the defendant as soon as practicable but not later than 14 days before trial of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(7) Defendant's Disclosure.

(A) Subject to constitutional limitations, the defendant shall provide the prosecuting attorney with the following information and materials not later than 35 days before trial:

(I) A list of witnesses whom the defendant may call at the sentencing hearing. Along with the name of the witness, the defendant shall furnish the witness's address and date of birth, the subject matter of the witness's testimony, and any written or recorded statement of that witness, including notes, that comprise substantial recitations of witness statements and relate to the subject matter of the testimony;

(II) A list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the defendant may introduce at the sentencing hearing;

(III) Any reports, recorded statements, and notes of any expert whom the defendant may call as a witness during the sentencing hearing, including results of physical or mental examinations and scientific tests, experiments, or comparisons.

(B) Any material subject to this subsection (7) that the defendant believes contains self-incriminating information that is privileged from disclosure to the prosecution prior to the sentencing hearing shall be submitted by the defendant to the trial judge under seal no later than 49 days before trial. The trial judge shall review any material submitted under seal pursuant to this paragraph (B) to determine whether it is in fact privileged.

(I) Any material submitted under seal pursuant to this paragraph (c) that the judge finds to be privileged from disclosure to the prosecution prior to the sentencing hearing shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(II) If the trial judge finds any of the material submitted under seal pursuant to this paragraph (B) to be not privileged from disclosure to the prosecution prior to the sentencing hearing, the trial judge shall notify the defense of its findings and allow the defense 7 days after such notification in which to seek a modification, review or stay of the court's order requiring disclosure.

(III) The trial judge may excise information it finds privileged from information it finds not privileged in order to disclose as provided in (II) above.

(8) Regulation of Discovery and Sanctions. No party shall be permitted to rely at the sentencing hearing upon any witness, material, or information that is subject to disclosure pursuant to this rule until it has been disclosed to the opposing party. The trial court, upon a showing of good cause, may grant an extension of time to comply with the requirements of this rule. If it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may enter an order against such party that the court deems just under the circumstances, and which is consistent with constitutional limitations, including but not limited to an order to permit the discovery or inspection of materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials, or impose sanctions against the offending party.

Source: Entire rule adopted and effective September 1, 1995; (f) to (h) amended and effective January 14, 1999; (f)(6)(III) corrected, effective March 2, 1999; IP(f)(6) corrected, effective March 31, 1999; entire rule amended and adopted March 11, 2004, effective July 1, 2004; (b), (d)(1) to (d)(6), IP(d)(7)(A), and (d)(7)(B), amended and adopted December 14, 2011, effective July 1, 2012.

Rule 32.2. Death Penalty Post-Trial Procedures

(a) Purpose and Scope. The purpose of this rule is to establish a fair, just and expeditious procedure for conducting trial court review of any post-trial motions and of any post-conviction motions, and for conducting appellate review of direct appeal and post-conviction review appeal in class one felony cases in which a sentence of death is imposed, as directed by section 16-12-201, et seq.

(b) Trial Court Procedure.

(1) Stay of Execution. The trial judge, upon the imposition of a death sentence, shall set the time of execution pursuant to section 18-1.3-1205 and enter an order staying execution of the judgment and sentence until receipt of an order from the supreme court.

The trial court shall immediately mail to the supreme court a copy of the judgment, sentence, and mittimus.

(2) **Motions for New Trial.** The defendant may file any post-trial motions, pursuant to Crim. P. 33, no later than 21 days after the imposition of sentence. The trial court, in its discretion, may rule on such motion before or after the sentencing hearing, but must rule no later than 91 days (13 weeks) after the imposition of sentence.

(3) **Advisement and Order.** Within 7 days after the imposition of a sentence of death, the court shall hold a hearing (advisement date) and shall advise the defendant pursuant to sections 16-12-204 and 205. On the advisement date, the court shall:

(I) Appoint new counsel to represent the defendant concerning direct appeal and post-conviction review matters absent waiver by the defendant;

(II) Make specific findings as to whether any waiver by the defendant of the right to post-conviction review, direct appeal, or the appointment of new counsel is made knowingly, voluntarily and intelligently;

(III) Order the prosecuting attorney to deliver to counsel for the defendant within 7 days of the advisement date one copy of all material and information in the prosecuting attorney's possession or control that is discoverable under Crim. P. 16 or pertains to punishment, unless such material and information has been previously provided to that counsel. Costs of copying and delivery of such material and information shall be paid by the prosecuting attorney;

(IV) If new counsel is appointed for the defendant, order defendant's trial counsel, at his or her cost, to deliver a complete copy of trial counsel's file to new counsel within 7 days of the advisement date;

(V) Direct that any post-conviction review motions be filed within 154 days (22 weeks) of the advisement date; and

(VI) Order the production of three copies of a certified transcript of all proceedings in the case: one for the supreme court, one for the prosecution and one for the defense. Transcripts that are completed by the advisement date will be immediately provided to the prosecution and to defense counsel to the extent that counsel does not already possess those transcripts. All other transcripts shall be completed and delivered within 21 days of the advisement date or within 21 days of any subsequent hearing.

(4) **Resolution of Post-conviction Motions.** The court, upon receipt of any motion raising post-conviction review issues, as described in section 16-12-206, shall promptly determine whether an evidentiary hearing is necessary, and if so, shall schedule the matter for hearing within 63 days (9 weeks) of the filing of such motions and enter its order on all motions within 35 days of the hearing. If no evidentiary hearing is required, the trial court shall rule within 35 days of the last day for filing the motions.

(5) **Record on Appeal.** In an appeal under this rule, the trial court shall designate the entire trial court record as the record on appeal. Within 21 days of the filing of the unitary notice of appeal, the trial court shall deliver to the supreme court any portion of the record not previously delivered under subsection (b)(3)(VI) of this rule.

(6) **Extension of Time.** Upon a showing of extraordinary circumstances that could not have been foreseen and prevented, the court may grant an extension of time with regard to the time requirements of sections (b)(2), (3), (4) and (5) of this rule.

(c) **Appellate Procedure.**

(1) **Unitary Notice of Appeal.** The notice of appeal for the direct appeal and the notice of appeal for all post-conviction review shall be filed by unitary notice in the supreme court within 7 days after the trial court's order on post-conviction review motions, or within 7 days after the expiration of the deadline for filing post-conviction review motions if none have been filed. The unitary notice of appeal need conform only to the requirements of sections (1), (2), (6) and (8) of C.A.R. 3(g).

(2) **Briefs.** Counsel for defendant shall file an opening brief no later than 182 days (26 weeks) after the filing of the notice of appeal. The prosecution shall file an answer brief no later than 126 days (18 weeks) after filing of the opening brief. Counsel for defendant may file a reply brief no later than 63 days (9 weeks) after filing of the answer brief. Extensions of time will not be granted except on a showing of extraordinary circumstances that could not have been foreseen and prevented. The opening brief may not exceed 250 pages or, in

the alternative, 79, 250 words; the answer brief may not exceed 250 pages or, in the alternative, 79, 250 words; and the reply brief may not exceed 100 pages or, in the alternative, 31,700 words. The Supreme Court may approve extensions not to exceed 75 pages or, in the alternative, 23,775 words for the opening and answer briefs, and 50 pages or 15, 850 words for the reply brief upon a showing of compelling need.

(3) **Consolidation.** Any direct appeal, any appeal of post-conviction review proceedings, and the review required by section 18-1.3-1201 (6) (a), shall be consolidated and resolved in one proceeding before the supreme court.

(4) **Further Proceedings.**

(I) After the supreme court resolves the appeal, ineffective assistance of counsel on direct appeal may only be raised by a petition for rehearing filed in the supreme court, pursuant to section 16-12-204;

(II) Any notice of appeal concerning a trial court decision entered pursuant to section 16-12-209 or concerning any second or subsequent request for relief filed by the defendant, shall be filed in the supreme court within 35 days of the entry of the trial court's order. Such appeal shall be governed by the Colorado appellate rules as may be modified by the supreme court in case-specific orders designed to expedite the proceedings.

(d) **Sanctions.** The trial court and the supreme court may impose sanctions on counsel for willful failure to comply with this rule.

This rule shall apply to class one felony offenses committed on or after January 1, 1998 for which a sentence of death is imposed.

Source: Entire rule approved and adopted October 28, 1997, effective January 1, 1998; entire rule amended and adopted March 11, 2004, effective July 1, 2004; (c)(2) amended and effective April 3, 2008; (b)(2), IP(b)(3), (b)(3)(III), (b)(3)(IV), (b)(3)(V), (b)(4), (c)(1), (c)(2), and (c)(4)(II) amended and adopted December 14, 2011, effective July 1, 2012; (c)(1) amended and adopted June 21, 2012, effective July 1, 2012.

ANNOTATION

Section 16-12-208 (3) does not impose an absolute two-year time limit on presenting a unitary appeal to the supreme court. Rather the statute directs the supreme court to create the limit in court rules. An absolute two-year time extension prohibition does not exist either in statute or rule. This rule implements the leg-

islature's direction by imposing a series of highly specific time limits designed to meet the two-year goal when it can be accomplished without violating the defendant's constitutional rights or the legislature's expressly articulated goals. *People v. Owens*, 228 P.3d 969 (Colo. 2010).

Rule 33. New Trial

(a) **Motions for New Trial or Other Relief Optional.**

The party claiming error in the trial of any case may move the trial court for a new trial or other relief. The party, however, need not raise all the issues it intends to raise on appeal in such motion to preserve them for appellate review. If such a motion is filed, the trial court may dispense with oral argument on the motion after it is filed.

(b) **Motions for New Trial or Other Relief Directed by the Court.**

The court may direct a party to file a motion for a new trial or other relief on any issue. The failure of the party to file such a motion when so ordered shall preclude appellate review of the issues ordered to be raised in the motion. The party, however, need not raise all the issues it intends to raise on appeal in such motion to preserve them for appellate review.

(c) **Motion; Contents; Time.**

The court may grant a defendant a new trial if required in the interests of justice. The motion for a new trial shall be in writing and shall point out with particularity the defects and errors complained of. A motion based upon newly discovered evidence or jury misconduct shall be supported by affidavits. A motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the defendant, but if a review is pending the court may grant the motion

only on remand of the case. A motion for a new trial other than on the ground of newly discovered evidence shall be filed within 14 days after verdict or finding of guilt or within such additional time as the court may fix during the 14-day period.

(d) Appeal by Prosecution.

The order of the trial court granting the motion is a final order reviewable on appeal.

Source: Entire rule amended March 15, 1985, effective July 1, 1985; (a) amended October 29, 1987, effective January 1, 1989; (d) added April 20, 2000, effective July 1, 2000; (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. No Review Unless Motion Made.
- III. Motion, Contents, Time.
 - A. In General.
 - B. Contents.
 - C. Based on Newly Discovered Evidence.
 - D. Based on Other Grounds.

I. GENERAL CONSIDERATION.

Law reviews. For note, "The Criminal Jury and Misconduct in Colorado", see 36 U. Colo. L. Rev. 245 (1964). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with a motion for a new trial based on recanted testimony, see 62 Den. U. L. Rev. 189 (1985).

Prior to April, 1974, motion for new trial not required. Prior to April, 1974, there was no express language in any of the rules of criminal procedure or appellate rules that required a motion for new trial. *People v. Martinez*, 190 Colo. 507, 549 P.2d 758 (1976).

Motion does not bar double jeopardy protection against retrial. A motion for a new trial does not relinquish the right to invoke double jeopardy guarantees against retrial of the charge upon which no verdict was returned. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

Federal court will deny "habeas corpus" where defendant fails to exhaust remedies under this rule. *Tanksley v. Warden of State Penitentiary*, 429 F.2d 1308 (10th Cir. 1970).

Granting or denying motion for new trial does not constitute an appealable final judgment. *People v. Jones*, 690 P.2d 866 (Colo. App. 1984).

Applied in *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976); *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977); *People v. Vigil*, 39 Colo. App. 371, 570 P.2d 13 (1977); *People v. Davis*, 194 Colo. 466, 573 P.2d 543 (1978); *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978); *People v. Reyes*, 42 Colo. App. 73, 589 P.2d 1385 (1979); *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980); *People v. Glenn*, 200 Colo.

416, 615 P.2d 700 (1980); *People v. Smith*, 620 P.2d 232 (Colo. 1980); *People v. Trujillo*, 624 P.2d 924 (Colo. 1980); *People v. Dillon*, 631 P.2d 1153 (Colo. App. 1981); *People v. Holder*, 632 P.2d 607 (Colo. App. 1981); *People v. Dillon*, 633 P.2d 504 (Colo. App. 1981); *People v. Harris*, 633 P.2d 1095 (Colo. App. 1981); *People v. Allen*, 636 P.2d 1329 (Colo. App. 1981); *People v. Brassfield*, 652 P.2d 588 (Colo. 1982); *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983); *People v. Anderson*, 703 P.2d 650 (Colo. App. 1985).

II. NO REVIEW UNLESS MOTION MADE.

Lack of contemporaneous objection is waiver. Lack of contemporaneous objection to testimony at time of trial constitutes waiver of new trial, and issue cannot be raised on appeal. *People v. Routa*, 180 Colo. 386, 505 P.2d 1298 (1973).

Where defendant failed to object to an identification procedure at his preliminary hearing, and he made no objection to victim's testimony concerning the preliminary hearing identification at the trial or in his motion for new trial, defendant could not assert this objection for the first time on appeal. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

Appellate review is generally limited to errors presented to trial court for its consideration by a motion for new trial. *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978).

Only matters contained in the motion for new trial will be considered on appeal. *Quintana v. People*, 152 Colo. 127, 380 P.2d 667, cert. denied, 375 U.S. 863, 84 S. Ct. 132, 11 L. Ed. 2d 89 (1963); *Cook v. People*, 129 Colo. 14, 266 P.2d 776 (1954); *Rueda v. People*, 141 Colo. 502, 348 P.2d 957, cert. denied, 362 U.S. 923, 80 S.Ct. 673, 4 L. Ed. 2d 744 (1960); *Wilson v. People*, 143 Colo. 544, 354 P.2d 588 (1960); *Dyer v. People*, 148 Colo. 22, 364 P.2d 1062 (1961); *Peterson v. People*, 153 Colo. 23, 384 P.2d 460 (1963); *Brown v. People*, 158 Colo. 561, 408 P.2d 981 (1965); *Lucero v. People*, 158 Colo. 568, 409 P.2d 278 (1965).

Failure to raise an issue in the motion for a new trial deprives the appellate court of juris-

diction to consider it unless the issue is one involving plain error affecting the substantial rights of the defendant. *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Failure to file a motion for new trial precludes consideration of issues raised on appeal. *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980); *People v. Ullerich*, 680 P.2d 1306 (Colo. App. 1983).

Matters which counsel intends to raise on appeal must be preserved in a motion for a new trial. *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

When errors alleged with regard to the admission of testimony were not raised during the trial or in the defendant's motion for a new trial, they need not be considered on appeal. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Absent a properly filed and acted on motion for new trial, appellate review is precluded. *People v. Nisted*, 653 P.2d 60 (Colo. App. 1980).

Filing notice of appeal divests court of power to grant motion. Once the notice of appeal is filed, the trial court is left powerless to grant a motion for a new trial. *People v. Dillon*, 655 P.2d 841 (Colo. 1982).

Motion prerequisite for review of probation revocation. A motion for new trial is a prerequisite for appellate review of a revocation of probation except when the propriety of a sentence is being appealed as provided in Rule 4(c), C.A.R. *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980).

And motion required for review of revocation of deferred sentence. Compliance with the motion for a new trial requirement of section (a) is a prerequisite for appellate review of a trial court's judgment revoking a deferred sentence, and imposing a sentence. *Hallman v. People*, 652 P.2d 173 (Colo. 1982).

Reasons need not be set forth in denial of motion. When a motion for a new trial is denied, reasons need not be set forth, because the motion is the basis and foundation for review of the judgment on appeal. *Losavio v. District Court*, 182 Colo. 186, 512 P.2d 264 (1973).

But where there is a claim that the trial court committed plain error which was prejudicial to substantial rights of the defendant, appellate review may be had without the issue being raised in a new trial motion. *People v. Ullerich*, 680 P.2d 1306 (Colo. App. 1983).

III. MOTION, CONTENTS, TIME.

A. In General.

Purpose of a motion for a new trial is to accord the trial judge a fair opportunity to consider and correct, if necessary, any erroneous rulings, and to acquaint him with the specific objection to those rulings. *Losavio v. District Court*, 182 Colo. 186, 512 P.2d 264 (1973).

The only purpose of requiring a motion for a new trial is to correct the trial court's own errors. *Haas v. People*, 155 Colo. 371, 394 P.2d 845 (1964).

Timely motion for new trial is not jurisdictional in the sense that without it the court would lack authority to adjudicate the subject matter. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Unlike cases governed by the rules of civil procedure, in a criminal case the timely filing of a motion for new trial is not a jurisdictional prerequisite to the appeal of a judgment of conviction. *People v. Masamba*, 39 Colo. App. 197, 563 P.2d 382 (1977).

An untimely filed motion for new trial does not divest an appellate court of jurisdiction to consider the issues raised on appeal which are also presented in the motion. *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980).

Trial court may grant extension of filing time. In contrast to the provisions of the rules of civil procedure governing motions for new trial, upon a showing of excusable neglect the trial court is authorized under the criminal rules of procedure to grant an extension of time for filing the motion for new trial after the original 10 days had expired, or, after the expiration of any extended date granted by the trial court. *People v. Masamba*, 39 Colo. App. 197, 563 P.2d 382 (1977).

Defendant may show excusable neglect for late filing. Where the prosecution objects to the late filing of a motion for new trial prior to the time of hearing on the motion, the defendant is afforded the opportunity to show, pursuant to Rule 45(b)(2), Crim. P., that the late filing was due to excusable neglect. *People v. Masamba*, 39 Colo. App. 197, 563 P.2d 382 (1977).

Timeliness issue held waived. The prosecution, by failing to object to the trial court's hearing and deciding the new trial motion, waived their right to raise the timeliness issue on appeal. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Where there was no affirmative showing in the record on appeal that the prosecution objected to the late filing of defendant's motion for new trial prior to the time it was ruled upon by the trial court, that objection was deemed waived, and the prosecution was estopped to raise it for the first time on appeal. *People v. Masamba*, 39 Colo. App. 197, 563 P.2d 382 (1977).

Granting of motion is in court's discretion. Where an error is called to the court's attention for the first time in a motion for new trial, the question of whether a new trial should be granted involves the exercise of the court's discretion. *Abeyta v. People*, 145 Colo. 173, 358 P.2d 12 (1960).

Such as for misconduct of counsel. The question of whether a new trial should be granted for misconduct of counsel in his remarks to the jury rests in the sound judicial discretion of the trial court. *Lee v. People*, 170 Colo. 268, 460 P.2d 796 (1969).

And this discretion will not be interfered with on appeal unless it manifestly appears that such discretion has been abused. *Lee v. People*, 170 Colo. 268, 460 P.2d 796 (1969).

But this rule includes mandatory provision that motion based on newly discovered evidence be supported by affidavits, and this provision is impervious to judicial discretion. *People ex rel. J.P.L.*, 214 P.3d 1072 (Colo. App. 2009).

The standard by which to judge a court's grant of a new trial under this rule is whether the court abused its discretion. *People v. Jones*, 942 P.2d 1258 (Colo. App. 1996).

Motion for new trial after trial on merits preserves errors alleged in sanity trial. A motion for a new trial after trial on the merits is sufficient to preserve for appeal errors alleged in the sanity trial, because the judgment declaring the defendant sane is not final for appeal purposes until defendant is found guilty of the crime charged. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

For differing considerations governing effect of time limitations in criminal cases and in civil cases, see *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

In order for a new trial to be granted on the basis of a prosecutor's remarks, in the absence of a contemporaneous objection, they must be particularly egregious. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

No basis in the record to conclude the jury's review of a silent videotape during deliberations was in any way prejudicial and the trial court therefore properly denied defendant's motion for a mistrial or new trial on this basis. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

B. Contents.

Points of error must be raised with particularity. This rule requires the filing of a motion for new trial in which points of error must be raised with particularity. *Feldstein v. People*, 159 Colo. 107, 410 P.2d 188 (1966). See *Jobe v. People*, 158 Colo. 571, 408 P.2d 972 (1965); *Cruz v. People*, 165 Colo. 495, 441 P.2d 22 (1968).

Attention should be drawn specifically to the alleged objectionable rulings in a motion for a new trial, and general objections and assignments of error fall far short of calling to the court's attention any specific error made in connection with its rulings. *Losavio v. District Court*, 182 Colo. 186, 512 P.2d 264 (1973).

To give guidance to court. When the motion for a new trial does not set forth with particularity the reason that a new trial is required, a vacuum exists which leaves the trial judge without direction and without guidance as to how the new trial should be conducted. *Losavio v. District Court*, 182 Colo. 186, 512 P.2d 264 (1973).

Testimony treated as substance of affidavit. A witness's testimony on direct examination may be treated as constituting the substance of the affidavit required for a new trial. *Hernandez v. People*, 175 Colo. 155, 486 P.2d 24 (1971).

C. Based on Newly Discovered Evidence.

Motion regarded with disfavor. A motion for new trial on grounds of newly discovered evidence is regarded with disfavor. *People v. Gallegos*, 187 Colo. 6, 528 P.2d 229 (1974); *People v. Jones*, 690 P.2d 866 (Colo. App. 1984); *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Williams*, 827 P.2d 612 (Colo. App. 1992); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993); *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

A motion for new trial based on newly discovered evidence is generally not looked upon with great favor because to do otherwise would encourage counsel to neglect to gather all available evidence for the first trial and, if unsuccessful, then to become diligent in securing other evidence to attempt to reverse the outcome on a second trial. *People v. Mays*, 186 Colo. 123, 525 P.2d 1165 (1974); *People v. Scheidt*, 187 Colo. 20, 528 P.2d 232 (1974).

Motion addressed to court's discretion. A motion for new trial based upon newly discovered evidence is addressed to the sound discretion of the trial court. *People v. Gallegos*, 187 Colo. 6, 528 P.2d 229 (1974).

And unless an abuse of discretion is affirmatively shown, the denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal. *People v. Gallegos*, 187 Colo. 6, 528 P.2d 229 (1974); *People v. Jones*, 690 P.2d 866 (Colo. App. 1984); *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

The denial of a motion for a new trial based upon newly discovered evidence will not be overturned unless there has been shown a clear abuse of the trial court's discretion. *People v. Scheidt*, 187 Colo. 20, 528 P.2d 232 (1974).

Trial court did not abuse its discretion in denying motion for new trial due to newly discovered evidence because the evidence probably would not have resulted in an acquittal on retrial. *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

To succeed on motion for new trial based upon newly discovered evidence, the defendant should show that the evidence was discovered after the trial; that defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; that the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching; and that on retrial the newly discovered evidence would probably produce an acquittal. *People v. Scheidt*, 187 Colo. 20, 528 P.2d 232 (1974); *People v. Jones*, 690 P.2d 866 (Colo. App. 1984); *People v. Williams*, 827 P.2d 612 (Colo. App. 1992).

Showing of diligent search and inquiry is a cardinal prerequisite of a new trial based upon newly discovered evidence. *Isbell v. People*, 158 Colo. 126, 405 P.2d 744 (1965); *Pieramico v. People*, 173 Colo. 276, 478 P.2d 304 (1970); *People v. Jones*, 690 P.2d 866 (Colo. App. 1984).

When defense was aware of the possibility that someone else committed the crime but didn't pursue the theory and instead chose to rely on alibi witness, the motion for new trial was properly denied. *People v. Stephens*, 689 P.2d 666 (Colo. App. 1984).

Else motion will be denied. Where the newly discovered evidence was cumulative in nature and could, with the exercise of due diligence, have been discovered before trial, motion for new trial was properly denied. *People v. Mays*, 186 Colo. 123, 525 P.2d 1165 (1974).

When evidence could have been discovered with reasonable diligence and the result of the trial would probably not have been changed if the evidence had been presented, the trial court properly denied the motion for a new trial. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Denial for motion for new trial based upon newly discovered evidence was proper where the asserted newly discovered evidence was either merely cumulative or impeaching and was neither material to the issues involved nor would it have probably produced a verdict of acquittal on retrial. *People v. Williams*, 827 P.2d 612 (Colo. App. 1992); *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

Evidence must be of character to probably bring about acquittal. Newly discovered evidence must be of such a character as to probably bring about an acquittal verdict if presented at another trial. *People v. Scheidt*, 187 Colo. 20, 528 P.2d 232 (1974); *People v. Jones*, 690 P.2d 866 (Colo. App. 1984).

As where codefendant is induced. Where the motion for new trial sets forth as newly discovered evidence the fact that following defendant's conviction the charge against a codefendant is dismissed, and that this casts grave doubt as to the truth of his testimony that no

promise had been made to him, then the ends of justice require that the court conduct a hearing with the additional consideration of any probative evidence on the question of whether there was any inducement to procure the codefendant's testimony, the extent and nature thereof, if so, and then grant or deny the motion. *Mitchell v. People*, 170 Colo. 117, 459 P.2d 284 (1969).

Evidence showing verdict influenced by false testimony sufficient. If newly discovered evidence is of such a character as to make it appear that the verdict was probably influenced by false or mistaken testimony and that upon another trial the result would probably, or might, be different, or even doubtful, then a new trial should be granted. *Cheatwood v. People*, 164 Colo. 334, 435 P.2d 402 (1967); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971); *DeLuzio v. People*, 177 Colo. 389, 494 P.2d 589 (1972).

But cumulative evidence insufficient. Where the newly discovered evidence was cumulative in nature and could, with the exercise of due diligence, have been discovered before trial, and the outcome of the case on retrial would probably be the same, motion for new trial was properly denied. *People v. Mays*, 186 Colo. 123, 525 P.2d 1165 (1974).

Evidence to discredit expert testimony insufficient. Newly discovered evidence that would merely tend to discredit or impeach expert testimony would not be grounds for a new trial. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Evidence held not newly discovered as contemplated by this rule. See *Steward v. People*, 179 Colo. 31, 498 P.2d 933 (1972).

Evidence within the defendant's knowledge before trial does not constitute newly discovered evidence as a basis for a new trial. *People v. Gallegos*, 187 Colo. 6, 528 P.2d 229 (1974).

Where defendant filed a motion for a new trial based on newly discovered evidence, such evidence being that defendant was threatened with death if he testified in his own behalf and such threat was made without the knowledge of his attorney, the motion was properly denied since this was not a case of newly discovered evidence as the evidence presented consisted of facts which obviously were known to the defendant at the time of his trial. *People v. Drumright*, 189 Colo. 26, 536 P.2d 38 (1975).

Magistrate did not abuse his discretion in denying motion for a new trial where movant failed to file mandatory supporting affidavits with the motion and magistrate denied motion based on this deficiency. *People ex rel. J.P.L.*, 214 P.3d 1072 (Colo. App. 2009).

A defendant who has pled guilty is not entitled to request a new trial under this rule because the defendant has been convicted not

after trial but upon his or her own admissions. *People v. Ambos*, 51 P.3d 1070 (Colo. App. 2002).

D. Based on Other Grounds.

Trial court did not abuse discretion by denying motion for a new trial without a hearing where several hearings were set that had to be continued because of defendant's hostility and unwillingness to cooperate with counsel. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Trial court did not err in denying defendant a hearing on his motion for a new trial based on ineffective assistance of counsel where defendant failed to allege any acts or omissions of defense counsel that deprived him of a defense. In the absence of particularized facts supporting defendant's assertion of ineffective assistance of counsel, it was within the trial court's discretion to deny defendant a hearing on the motion. *People v. Esquivel-Alaniz*, 985 P.2d 22 (Colo. App. 1999).

Motion denied where defendant received fair, although not perfect, trial. Although defendant did not receive a perfect trial, he did receive a fair trial, and because the law of Colorado entitles him to nothing more, his motion for a new trial was denied. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Fact that jury deliberates less than 45 minutes does not warrant the granting of a new trial. *People v. Elliston*, 181 Colo. 118, 508 P.2d 379 (1973).

Evidence which is cumulative or corroborative will normally not support the granting of a motion for new trial. *People v. Gallegos*, 187 Colo. 6, 528 P.2d 229 (1974).

Discovery of evidence unlikely to change verdict insufficient. A new trial is not required whenever a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. *Sandoval v. People*, 180 Colo. 180, 503 P.2d 1020 (1972).

New trial on basis of prosecution asking improper questions denied. See *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

In order to justify a new trial based on a tainted jury, the defendant must show evidence of prejudice. *People v. Barger*, 732 P.2d 1225 (Colo. App. 1986).

Prejudice occurring during jury sequestration. The determination of whether prejudice has occurred during jury sequestration is within the sound discretion of the trial court and only where that discretion has been abused will a

new trial be ordered. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Presence of armed uniformed officers in courtroom insufficient. The court did not abuse its discretion in overruling defendant's motion for a new trial where defendant asserted that the presence of two armed uniformed officers in the courtroom constituted prejudicial error. *People v. Romero*, 182 Colo. 50, 511 P.2d 466 (1973).

Phone call by juror insufficient, absent showing of prejudice. It is not error to fail to grant a new trial because a juror allegedly makes a phone call out of the bailiff's presence, which is not shown to be prejudicial to the defendant. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

Improper communications to jury are presumptively prejudicial, especially if the communications deal with the punishment or sentencing of a defendant. *People v. Cornett*, 685 P.2d 224 (Colo. App. 1984).

Juror misconduct. Defendant must establish the truth of the allegations on which he bases his motion for a new trial and produce evidence of the alleged juror misconduct. *People v. Stephens*, 689 P.2d 666 (Colo. App. 1984).

Allegations on which motion based must be supported by evidence. Mere hearsay allegations in an affidavit will warrant denial of motion. *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984).

Failure to establish the truth of hearsay allegations contained in an affidavit will warrant denial of a motion for a new trial based on alleged juror misconduct. *People v. Rogers*, 706 P.2d 1288 (Colo. App. 1985).

Misconduct of juror in sleeping through defense counsel's closing argument sufficiently prejudiced defendant to warrant a new trial. *People v. Evans*, 710 P.2d 1167 (Colo. App. 1985).

Untruthful answers on voir dire concerning material matters do not entitle a party to a new trial per se. Under some circumstances, however, a juror's nondisclosure of information during jury selection may be grounds for a new trial. *Allen v. Ramada Inn, Inc.*, 778 P.2d 291 (Colo. App. 1989).

Only undisclosed information material to defendant's theory of the case and which might have affected the outcome of the trial will mandate reversal. *People v. Rogers*, 706 P.2d 1288 (Colo. App. 1985).

Jurors learning of a co-defendant's guilty plea and capture of another co-defendant through the media insufficient absent a showing of prejudice. *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Rule 34. Arrest of Judgment

The court shall arrest judgment if the indictment or information, complaint, or summons and complaint does not charge an offense, or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 14 days after verdict or finding of guilt or within such further time as the court may fix during the 14-day period. A motion in arrest of judgment may be set forth alternatively as a part of a motion for a new trial.

Source: Entire rule amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Sufficiency of information may be raised after trial by motion. The sufficiency of an information is a matter of jurisdiction, which may be raised after trial by a motion in arrest of

judgment. *People v. Garner*, 187 Colo. 294, 530 P.2d 496 (1975).

Denial of motion held correct. *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973).

Rule 35. Postconviction Remedies

(a) **Correction of Illegal Sentence.** The court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) **Reduction of Sentence.** The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is imposed, or (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) **Other Remedies.**

(1) If, prior to filing for relief pursuant to this paragraph (1), a person has sought appeal of a conviction within the time prescribed therefor and if judgment on that conviction has not then been affirmed upon appeal, that person may file an application for postconviction review upon the ground that there has been a significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

(2) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the grounds hereinafter set forth. Such an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(I) That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state;

(II) That the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(III) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(IV) Repealed.

(V) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(VI) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(VII) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(3) One who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside on one or more of the grounds enumerated in section (c)(2) of this Rule may file a motion in the court which imposed the sentence to vacate, set aside, or correct the sentence, or to make such order as necessary to correct a violation of his constitutional rights. The following procedures shall apply to the filing and hearing of such motions:

(I) Any motion filed outside of the time limits set forth in § 16-5-402, 6 C.R.S., shall allege facts which, if true, would establish one of the exceptions listed in § 16-5-402 (2), 6 C.R.S.

(II) Any motion filed shall substantially comply with the format of Form 4 and shall substantially contain the information identified in Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). See Appendix to Chapter 29.

(III) If a motion fails to comply with Subsection (II) the court shall return to the defense a copy of the document filed along with a blank copy of Form 4 and direct that a motion in substantial compliance with the form be filed within 49 days.

(IV) The court shall promptly review all motions that substantially comply with Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). In conducting this review, the court should consider, among other things, whether the motion is timely pursuant to § 16-5-402, whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue. If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion. The court shall complete its review within 63 days (9 weeks) of filing or set a new date for completing its review and notify the parties of that date.

(V) If the court does not deny the motion under (IV) above, the court shall cause a complete copy of said motion to be served on the prosecuting attorney if one has not yet been served by counsel for the defendant. If the defendant has requested counsel be appointed in the motion, the court shall cause a complete copy of said motion to be served on the Public Defender. Within 49 days, the Public Defender shall respond as to whether the Public Defender's Office intends to enter on behalf of the defendant pursuant to § 21-1-104(1)(b), 6 C.R.S. In such response, the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and add any claims the Public Defender finds to have arguable merit. Upon receipt of the response of the Public Defender, or immediately if no counsel was requested by the defendant or if the defendant already has counsel, the court shall direct the prosecution to respond to the defendant's claims or request additional time to respond within 35 days and the defendant to reply to the prosecution's response within 21 days. The prosecution has no duty to respond until so directed by the court. Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law. At the hearing, the court shall take whatever evidence is necessary for the disposition of the motion. The court shall enter written or oral findings either granting or denying relief within 63 days (9 weeks) of the conclusion of the hearing or provide the parties a notice of the date by which the ruling will be issued.

If the court finds that defendant is entitled to postconviction relief, the court shall make such orders as may appear appropriate to restore a right which was violated, such as vacating and setting aside the judgment, imposing a new sentence, granting a new trial, or discharging the defendant. The court may stay its order for discharge of the defendant pending appellate court review of the order. If the court orders a new trial, and there are witnesses who have died or otherwise become unavailable, the transcript of testimony of

such witnesses at the trial which resulted in the vacated sentence may be used at the new trial.

(VI) The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant, except the following:

(a) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

(b) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied retroactively by the United States Supreme Court or Colorado appellate courts.

(VII) The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought except the following:

(a) Any claim based on events that occurred after initiation of the defendant's prior appeal or postconviction proceeding;

(b) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

(c) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review;

(d) Any claim that the sentencing court lacked subject matter jurisdiction;

(e) Any claim where an objective factor, external to the defense and not attributable to the defendant, made raising the claim impracticable.

(VIII) Notwithstanding (VII) above, the court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.

(IX) The order of the trial court granting or denying the motion is a final order reviewable on appeal.

Source: (c)(3) amended and adopted September 4, 1997, effective January 1, 1998; (c)(3) amended and committee comment added January 7, 1999, effective July 1, 1999; entire section amended and adopted and committee comment repealed January 29, 2004, effective July 1, 2004; (c)(3)(VIII) corrected May 25, 2004, nunc pro tunc January 29, 2004, effective July 1, 2004; (c)(3)(I), (c)(3)(II), (c)(3)(IV), and (c)(3)(V) corrected June 25, 2004, nunc pro tunc January 29, 2004, effective July 1, 2004; (c)(3)(II) and (c)(3)(III) amended and effective December 11, 2008; (b), (c)(3)(III), (c)(3)(IV), (3)(c)(V) 1st paragraph amended and adopted December 14, 2011, effective July 1, 2012.

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I. GENERAL CONSIDERATION.

Law reviews. For comment on Madrid v. People, 148 Colo. 149, 365 P.2d 39 (1961), appearing below, see Rocky Mtn. L. Rev. 400 (1962). For note, "Habeas Corpus Procedure",

see 41 Den. L. Ctr. J. 111 (1964). For comment on Hackett v. People, 158 Colo. 304, 406 P.2d 331 (1965), appearing below, see 38 U. Colo. L. Rev. 417 (1966). For note, "Federal Habeas Corpus Confronts the Colorado Courts: Catalyst or Cataclysm?", see 39 U. Colo. L. Rev. 83 (1966). For note, "Colorado Appellate Procedure", see 40 U. Colo. L. Rev. 551 (1968). For note, "Defects in Ineffective Assistance Standards Used by State Courts", see 50 U. Colo. L. Rev. 389 (1979). For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see 11 Colo. Law. 1225 (1982). For article, "Crim. P. 35(c): Colorado Law Regarding Postconviction Relief", see 22 Colo. Law. 729 (1993).

Defendant not entitled to relief where sentence legal and constitutional. Where the sentence is within statutory limits and does not infringe upon the defendant's constitutional rights, he is not entitled to relief under this rule. *People v. Mieyr*, 176 Colo. 90, 489 P.2d 327 (1971).

Previously, this rule provided in resentencing for credit for time already served. *Stafford v. People*, 165 Colo. 328, 438 P.2d 696 (1968).

And made filing a motion under this rule a prerequisite to habeas corpus. *Ralston v. People*, 161 Colo. 523, 423 P.2d 326 (1967).

This rule establishes postconviction remedies and is not an appropriate means to challenge rulings made in extradition proceedings. *Hodges v. Barry*, 701 P.2d 1240 (Colo. 1985).

A habeas corpus petition seeking relief available under section (c) should be treated as a section (c) motion. *Leske v. Golder*, 124 P.3d 863 (Colo. App. 2005).

Article II, § 16, of the Colorado Constitution does not create a constitutional right to counsel in a hearing under this rule. *People v. Duran*, 757 P.2d 1096 (Colo. App. 1988).

The district court was not obliged to consider a subsequent motion that plainly treated the same issues as the original motion filed pursuant to section (c). *People v. Adams*, 905 P.2d 17 (Colo. App. 1995).

A defendant may not use a proceeding under this rule to relitigate issues that were fully and finally resolved in an earlier appeal. *People v. Johnson*, 638 P.2d 61 (Colo. 1981); *People v. Real*, 950 P.2d 645 (Colo. App. 1997).

A hand-written letter that does not assert any claims for defendant's section (c) motion does not toll the time limit in § 16-5-402. *People v. Stovall*, 2012 COA 7, __ P.3d __.

Defendant needs only "assert", not necessarily "establish", a right to be released before being entitled to relief under section (c). *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

Defendant does not have a constitutional right to counsel in a Crim. P. 35 postconvic-

tion proceeding but does have a limited statutory right to counsel. An attorney appointed to assist defendant with a Crim. P. 35 proceeding who determines that defendant's claims are without merit may inform the court that he or she believes the claims are without merit and request permission to withdraw. If counsel is permitted to withdraw, defendant is not entitled to appointment of new counsel. *People v. Starkweather*, 159 P.3d 665 (Colo. App. 2006).

A limited statutory right to counsel exists for a hearing pursuant to §§ 21-1-103 and 21-1-104 and the waiver of such right to counsel must be made voluntarily but need not be knowingly and intelligent. *People v. Duran*, 757 P.2d 1096 (Colo. App. 1988).

No constitutional right to postconviction counsel exists; however, a limited statutory right exists. The statutory right to postconviction counsel is neither automatic nor unlimited. It is limited to cases where a defendant's section (c) petition is not wholly unfounded and has arguable merit, as determined by the court and the state public defender's office. *Silva v. People*, 156 P.3d 1164 (Colo. 2007).

If postconviction counsel is required according to the limited statutory right, that counsel must provide effective assistance as measured by the two-pronged Strickland v. Washington test. *Silva v. People*, 156 P.3d 1164 (Colo. 2007).

"Collateral attack" as used in § 16-5-402 includes relief sought pursuant to Crim. P. 35. *People v. Robinson*, 83 P.2d 832 (Colo. App. 1992).

Collateral attack on an adjudication of habitual criminality includes relief sought under this rule. *People v. Hampton*, 876 P.2d 1236 (Colo. 1994).

Defendant is not precluded from filing both a timely Crim. P. 35(b) motion and a Crim. P. 35(c) motion after conclusion of the direct appeal. *People v. Metcalf*, 979 P.2d 581 (Colo. App. 1999).

The limitation period cannot commence until there is a right to pursue a collateral attack. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Petitioner not entitled to appointed counsel when asserted claim for relief is wholly unfounded. *Brinklow v. Riveland*, 773 P.2d 517 (Colo. 1989); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Plain error occurs if waiver of statutory right to counsel in postconviction proceeding is involuntary. *People v. Duran*, 757 P.2d 1096 (Colo. App. 1988).

Without alleging specific facts in Crim. P. 35(c) motion that might appear in record to substantiate general allegations, defendant not entitled to have trial record provided to him at correctional facility. *People v. Mann*, 878 P.2d 71 (Colo. App. 1994).

Trial court has no authority to retain jurisdiction over a defendant after sentencing for the reason that the law may be changed by a subsequent court decision even though the court, at the time of sentencing, is aware of a case appealed to the state supreme court which may change the interpretation of statute regarding credit against the sentence for presentence confinement. *People v. Mortensen*, 856 P.2d 45 (Colo. App. 1993).

Motions under this rule are subject to statutory limitations in § 16-5-402. *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992); *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993); *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996); *People v. Ambros*, 51 P.3d 1070 (Colo. App. 2002); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

The time limits in § 16-5-402 (1) are specifically categorized by level of offense, so, in a case in which defendant is convicted of a class 1 felony and other felonies, the time limit for the class 1 felony does not control the time limit for all of the convictions that are not class 1 felonies. Defendant's challenges to the non-class 1 felonies in a section (c) motion were subject to the three-year statute of limitations. *People v. Stovall*, 2012 COA 7, ___ P.3d ___.

Statutory limitations in § 16-5-402 do not usurp the supreme court's rulemaking authority. While the statute has an incidental effect on judicial procedure, it is primarily an expression of public policy, and therefore it prevails over terms of subsection (c)(3) of this rule stating that motion may be filed "at any time". *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992).

Justifiable excuse or excusable neglect would be established if the public defender's conflict of interest was the reason for not filing a motion for post-conviction relief on behalf of defendant. *People v. Chang*, 179 P.3d 240 (Colo. App. 2007).

Justifiable excuse or excusable neglect would be established if the public defender's failure to file a motion for post-conviction relief on behalf of defendant was the result of ineffective counsel. *People v. Chang*, 179 P.3d 240 (Colo. App. 2007).

In a hearing pursuant to this rule, the burden rests on the defendant to show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense of the defendant. *People v. Duran*, 757 P.2d 1096 (Colo. App. 1988); *People v. Valdez*, 789 P.2d 406 (Colo. 1990).

Evidentiary hearing was required on defendant's claim of ineffective assistance of counsel, although not every such motion requires an evidentiary hearing. *People v. Thomas*, 867 P.2d 880 (Colo. 1994).

Defendant could not be deprived of opportunity to prove counsel's choices lacked sound strategic motive unless the existing record clearly established otherwise or those choices could not have been prejudicial in any event. *Ardolino v. People*, 69 P.3d 73 (Colo. App. 2003).

Defendant entitled to evidentiary hearing as long as the allegations of his motion, in light of the existing record, were not clearly insufficient to undermine confidence in the outcome of the trial by demonstrating a reasonable probability that but for counsel's challenged conduct, the defendant would not have been convicted. *Ardolino v. People*, 69 P.3d 73 (Colo. App. 2003).

A second Crim. P. 35(c) motion cannot be used procedurally to raise mere ineffective assistance of counsel in a prior Crim. P. 35(c) proceeding. The ineffectiveness of appointed postconviction counsel does not constitute a statutory violation, because a defendant has no statutory right to such counsel. *People v. Silva*, 131 P.3d 1082 (Colo. App. 2005).

Rule does not provide a method for reviewing the punishment assessed in a punitive contempt proceeding. In order to seek relief under this rule, a person must have been convicted of a crime. Conduct that results in punitive sanctions being imposed for contempt is not a common law or statutory crime. *Benninghoven v. Dees*, 849 P.2d 906 (Colo. App. 1992).

Subsection (c)(3) requires a hearing and the entry of findings of fact and conclusions of law where defendant who was mistakenly released from custody before serving second sentence sought credit for time spent at liberty. *People v. Stark*, 902 P.2d 928 (Colo. App. 1995).

Failure to review motion within 60 days as required by subsection (c)(3)(IV) does not entitle defendant to relief nor deprive the court of subject matter jurisdiction. The time limit is properly categorized as directory rather than jurisdictional. *People v. Osorio*, 170 P.3d 796 (Colo. App. 2007).

Requirement that a copy of a motion be served on public defender is triggered when the court finds it necessary to consider matters outside of the motion, files, and record of the case. *People v. Davis*, 2012 COA 14, 272 P.3d 1167.

The district court is required to make findings of fact and conclusions of law in every determination of a motion made pursuant to subsection (c)(3). *People v. Breaman*, 939 P.2d 1348 (Colo. 1997).

A defendant cannot bring an illegal sentence claim under Crim. P. 35(a) if the sentence is consistent with the statutory scheme but imposed in an unconstitutional manner. Instead, the defendant must bring the claim under Crim.

P. 35(c)(2)(I). *People v. Wenzinger*, 155 P.3d 415 (Colo. App. 2006).

Prosecution may file a Crim. P. 35(a) motion to correct illegal sentence. *People v. White*, 179 P.3d 58 (Colo. App. 2007).

The court simply stating, in denying a motion made pursuant to subsection (c)(3), that it "accepted appointed counsel's status report" was contrary to the requirement that the court make its own finding of facts and conclusions of law. *People v. Breaman*, 939 P.2d 1348 (Colo. 1997).

Motion for post-conviction relief was timely when filed less than three years after the final decision on defendant's appeal. *People v. Rivera*, 964 P.2d 561 (Colo. App. 1998).

For purposes of the time limit within which a section (c) motion must be filed, a defendant's conviction is final when his or her appeal rights have been exhausted. More specifically, it is final when the supreme court denies defendant's petition for a writ of certiorari and the mandate issues. *People v. Stanley*, 169 P.3d 258 (Colo. App. 2007).

Trial court did not err in denying a section (c) motion as untimely where defendant did not raise a direct appeal or collateral attack of his Virginia conviction until almost 14 years after his conviction had entered. *People v. Landis*, 9 P.3d 1165 (Colo. App. 2000).

A defendant cannot use this rule to relitigate matters fully and finally resolved in an earlier appeal. Moreover an argument will be precluded if its review is nothing more than a second appeal on the same issues on some recently contrived constitutional theory. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996); *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001); *Leske v. Golder*, 124 P.3d 863 (Colo. App. 2005).

A properly filed section (b) motion tolls the one-year limitation period in § 2244(d)(1) of the federal Antiterrorism and Effective Death Penalty Act of 1996. *Robinson v. Golder*, 443 F.3d 718 (10th Cir.), cert. denied, 549 U.S. 867, 127 S. Ct. 166, 166 L. Ed. 2d 118 (2006).

Pro se defendant's failure to file a Crim. P. 35(c) motion on form 4 does not deprive the trial court of subject matter jurisdiction. Section (c)(3)(II) requires only that pro se motions substantially comply with form 4. *People v. Stanley*, 169 P.3d 258 (Colo. App. 2007).

Applied in *Sides v. Tinsley*, 333 F.2d 1002 (10th Cir. 1964); *Sepulveda v. Colo.*, 335 F.2d 581 (10th Cir. 1964); *Watson v. Patterson*, 358 F.2d 297 (10th Cir.), cert. denied, 385 U.S. 876, 87 S. Ct. 153, 17 L. Ed. 2d 103 (1966); *Terry v. Patterson*, 372 F.2d 480 (10th Cir. 1967); *Ralston v. People*, 161 Colo. 523, 423 P.2d 326 (1967); *Roberts v. People*, 169 Colo. 115, 453 P.2d 793 (1969); *Neighbors v. People*, 171 Colo. 349, 467 P.2d 804 (1970); *Ward v. Peo-*

ple, 172 Colo. 244, 472 P.2d 673 (1970); *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970); *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972); *People v. Seymour*, 182 Colo. 262, 512 P.2d 635 (1973); *People v. Griswold*, 190 Colo. 136, 543 P.2d 1251 (1975); *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975); *People v. Martinez*, 192 Colo. 388, 559 P.2d 228 (1977); *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977); *People v. Mendoza*, 195 Colo. 19, 575 P.2d 403 (1978); *People v. Lipinski*, 196 Colo. 50, 580 P.2d 1243 (1978); *Carr v. Barnes*, 196 Colo. 70, 580 P.2d 803 (1978); *People v. Houpe*, 41 Colo. App. 253, 586 P.2d 241 (1978); *People v. McKnight*, 41 Colo. App. 372, 588 P.2d 886 (1978); *Mullins v. Evans*, 473 F. Supp. 132 (D. Colo. 1979); *Noe v. Dolan*, 197 Colo. 32, 589 P.2d 483 (1979); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979); *People v. Jones*, 198 Colo. 578, 604 P.2d 679 (1979); *People v. Medina*, 199 Colo. 1, 604 P.2d 682 (Colo. 1979); *People v. Calloway*, 42 Colo. App. 213, 591 P.2d 1346 (1979); *People v. West*, 42 Colo. App. 217, 592 P.2d 22 (1979); *People v. Quintana*, 42 Colo. App. 477, 601 P.2d 637 (1979); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *Wiggins v. People*, 199 Colo. 341, 608 P.2d 348 (1980); *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980); *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Aragon*, 44 Colo. App. 550, 622 P.2d 579 (1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981); *People v. Loggins*, 628 P.2d 111 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Macias*, 631 P.2d 584 (Colo. 1981); *People v. District Court*, 636 P.2d 689 (Colo. 1981); *People v. Schultheis*, 638 P.2d 8 (Colo. 1981); *People v. Cushon*, 631 P.2d 1164 (Colo. App. 1981); *People v. Boivin*, 632, P.2d 1038 (Colo. App. 1981); *People v. Lawson*, 634 P.2d 1019 (Colo. App. 1981); *People v. Moore*, 636 P.2d 1290 (Colo. App. 1981); *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981); *People v. Mascareñas*, 643 P.2d 786 (Colo. App. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Aragon*, 643 P.2d 43 (Colo. 1982); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Montoya*, 647 P.2d 1203 (Colo. 1982); *People v. Cushon*, 650 P.2d 527 (Colo. 1982); *People v. Coyle*, 654 P.2d 815 (Colo. 1982); *People v. Peterson*, 656 P.2d 1301 (Colo. 1983); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *People v. Chavez*, 659 P.2d 1381 (Colo. 1983); *People v. Martinez*, 660 P.2d 1292 (Colo. 1983); *People v. McCall*, 662 P.2d 178 (Colo. 1983); *People v. Giles*, 662 P.2d 1073 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v.*

Lesh, 668 P.2d 1362 (Colo. 1983); *People v. Smith*, 827 P.2d 577 (Colo. App. 1991); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

II. CORRECTION OF ILLEGAL SENTENCE.

When an original sentence is illegal, resentencing does not constitute double jeopardy even if the subsequent sentence is longer than the original, and even though the defendant has begun serving the original sentence. *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Court may correct an error in sentencing, and double jeopardy is not implicated when trial court corrects a sentencing error and imposes a longer sentence. *People v. White*, 179 P.3d 58 (Colo. App. 2007).

Where sentence is illegal, sentencing court may correct it at any time. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969); *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988); *Downing v. People*, 895 P.2d 1046 (Colo. 1995).

The imposition of an illegal sentence may be reviewed and corrected at any time. *People v. Favors*, 42 Colo. App. 263, 600 P.2d 78 (1979).

When an illegal sentence is corrected pursuant to section (a), it renews the three-year deadline for collaterally attacking the original judgment of conviction pursuant to section (c). *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

When original judgment of conviction contains an illegal sentence on one count, the entire sentence is illegal. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

The sentence is therefore subject to correction and the judgment of conviction is subject to amendment, making the judgment of conviction not final or fully valid. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

Court has right and duty to set aside void sentence at any time. *People v. Emig*, 177 Colo. 174, 493 P.2d 368 (1972).

So long as court retains jurisdiction. Where a trial court has jurisdiction of a person of the defendant and of the subject matter, and has imposed a sentence in error, the court retains jurisdiction to correct the sentence. Conversely, if the original sentence is a valid one, the trial court loses jurisdiction to change the sentence. *Smith v. Johns*, 187 Colo. 388, 532 P.2d 49 (1975).

And where statutory provision changes erroneous sentence automatically, court loses jurisdiction. There is no irreconcilable inconsistency between § 16-11-303 which deals with a person wrongfully sentenced to a definite term in the state reformatory, and section (a) of this rule. Section 16-11-303, changes the erroneous sentence automatically and a court, in altering the original sentence, acts in excess of jurisdic-

tion. *Smith v. Johns*, 187 Colo. 388, 532 P.2d 49 (1975).

The term "illegal sentence" no longer appears in section (a). That sentence was replaced with "a sentence that was not authorized by law". Under the current version of section (a), the only circumstance in which a sentence is "not authorized by law" is when it is inconsistent with the statutory scheme outlined by the legislature. *People v. Wenzinger*, 155 P.3d 415 (Colo. App. 2006); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Illegal sentence is a sentence not in full compliance with sentencing statutes. *Delgado v. People*, 105 P.3d 634 (Colo. 2005); *People v. White*, 179 P.3d 58 (Colo. App. 2007).

The sentence included an illegal parole term, therefore, it was an illegal sentence in its entirety. The imposition of an illegal sentence does not commence the 120-day deadline for filing a section (b) motion; only legal sentences trigger the rule's timeliness requirement. *Delgado v. People*, 105 P.3d 634 (Colo. 2005).

Because an illegal sentence represents a type of jurisdictional defect, the trial court retains the authority to correct its own error. The 120-day time limit applies only if the court is asked to "correct a sentence imposed in an illegal manner". If the sentence itself is illegal, the court may act at any time. *People v. White*, 179 P.3d 58 (Colo. App. 2007).

Defendant's claim that he was not given complete range of testing required by statute prior to sentencing is, in essence, a claim that the sentence was imposed in an illegal manner under section (a), and should have been asserted within 120 days of sentencing. *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Jurisdiction of appellate court. Where the district attorney claims that the trial court improperly considered the presumptive sentencing law and the defendant's conduct in prison as factors in evaluating a motion under section (b) for reduction of sentence, and that the trial court gave no consideration to the aggravated nature of the crimes for which the defendant was convicted, these claims are questions of law implicating the propriety of the proceeding itself and are sufficient to invoke appellate jurisdiction. *People v. Bridges*, 662 P.2d 161 (Colo. 1983).

Matter of illegal sentence need not be raised on appeal. There is no requirement contained in this rule that the matter of an illegal sentence must be raised on appeal from the conviction or be thereafter waived. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969).

Successive postconviction motions under subsection (a) subject to law of the case doctrine. Under law of the case doctrine, where appropriate, a court may overlook the doctrine and grant relief where manifest injustice would result. *People v. Tolbert*, 216 P.3d 1 (Colo. App. 2007).

Sentence to mandatory parole for attempted sexual assault committed between July 1, 1996 and July 1, 2002 is illegal. *People v. Tolbert*, 216 P.3d 1 (Colo. App. 2007).

Action of judge in changing sentence without notice and hearing improper. The action of the sentencing judge in changing an original sentence without notice to the defendant and without opportunity for a hearing is improper, for while this rule permits a judge to correct a sentence of his own motion, where proper grounds exist, it does not permit him to do so without notice to the prisoner and an opportunity afforded for a hearing. *Guerin v. Fullerton*, 154 Colo. 142, 389 P.2d 84 (1964).

Inmate had a protected liberty interest in a suspended sentence where his original sentence mandated a 10-year suspension when and if defendant could show successful completion of sex offender treatment. Defendant was entitled to due process protections before the trial court could modify the sentence. The court's order vacating the 10-year sentence reduction, sua sponte, denied defendant due process of law. The court erred in denying defendant's section (a) motion to correct the illegal sentence. *People v. Sisson*, 179 P.3d 193 (Colo. App. 2007).

Upon defendant commencing sentence, judge cannot change sentence upon parole board's recommendation. The sentencing judge does not have the authority on the recommendation of the parole board to change a sentence he imposed upon a defendant after he commences serving his sentence, for such authority is present only when the sentence is erroneous or void under section (a), and not where the original sentence imposed is legal. *Guerin v. Fullerton*, 154 Colo. 142, 389 P.2d 84 (1964).

And trial court cannot alter or amend commuted sentence imposed by the governor, because he has the exclusive power to grant reprieves, commutations, and pardons after conviction under § 7 of art. IV, Colo. Const. *People ex rel. Dunbar v. District Court*, 180 Colo. 107, 502 P.2d 420 (1972).

Where several sentences concurrent, argument that some of sentences invalid fails. Where the defendant assumes that his sentences for several crimes are to run consecutively, but the governing judgments made the serving of all the sentences concurrent, the argument that some, but not all, sentences are invalid fails. *Santistevan v. People*, 177 Colo. 329, 494 P.2d 75 (1972).

Sentence illegal where defendant not afforded benefit of amendatory legislation. A sentence imposed by the trial court which does not afford the defendant the benefit of amendatory legislation is not a valid and legal sentence. As such, it was subject to correction by the trial

court at any time. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

But defendant convicted of theft by receiving does not receive ameliorative benefit when retroactive application of amendatory legislation is clearly not intended by its own terms. Legislation that amended theft by receipt statute to provide that amendment shall apply to acts committed on or after July 1, 1985 makes it clear that amendment is to be applied prospectively only. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

Court may correct sentence to conform to "nolo contendere" plea. Error is harmless where after a court corrects a sentence it conforms to the advisement given a defendant pursuant to a plea of "nolo contendere". *People v. Baca*, 179 Colo. 156, 499 P.2d 317 (1972).

Sentence in error because extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. *People v. Jenkins*, 674 P.2d 981 (Colo. App. 1983), rev'd on other grounds, 687 P.2d 455 (Colo. 1984).

An unlawful sentence may be corrected by a sentencing court at any time. *People v. Reynolds*, 907 P.2d 670 (Colo. App. 1995).

Court may correct the mittimus where the trial court neglected to specify that its sentence included a mandatory period of parole. *People v. Mayes*, 981 P.2d 1106 (Colo. App. 1999).

Post-conviction motions that challenge the manner in which a plea is taken, such as whether the person was properly advised about the plea, are not challenges to the legality of the sentence and are properly brought pursuant to section (c), not section (a). *People v. Green*, 36 P.3d 125 (Colo. App. 2001); *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

Post-conviction motion challenging revocation of probation without a determination of ability to pay restitution should be brought under section (c), not section (a). *People v. Shepard*, 151 P.3d 580 (Colo. App. 2006).

There is no constitutional right to credit of presentence jail time against sentence imposed. *People v. Coy*, 181 Colo. 393, 509 P.2d 1239 (1973).

There is no constitutional right to credit for time spent in jail before sentence. *People v. Nelson*, 182 Colo. 1, 510 P.2d 441 (1973).

But credit for presentence jail time presumed. Wherever it is possible, as a matter of mechanical calculation, that credit could have been given for presentence jail time, it will be conclusively presumed that it was given. This means that where the actual sentence imposed

plus the time spent in jail prior to sentence do not exceed the maximum sentence which could be imposed, it will be conclusively presumed that the sentencing court gave the defendant credit for the presentence time spent in confinement. *Maciel v. People*, 172 Colo. 8, 469 P.2d 135 (1970).

Where sentencing judge states only that he is taking time spent in jail prior to sentencing into consideration and thereafter gives the maximum, it must be presumed that he acted properly; that is, that he took the time spent into consideration and determined, as he had the right to do, not to grant the credit. *People v. Nelson*, 182 Colo. 1, 510 P.2d 441 (1973).

And such rule outweighs any possible unfairness. The problems and expenditure of resources which would be caused by allowing each prisoner to attempt to demonstrate that in his particular case credit for presentencing confinement was not given outweighs any possible unfairness. *Maciel v. People*, 172 Colo. 8, 469 P.2d 135 (1970).

Defendants found not entitled to credit for presentence jail time. *People v. Puls*, 176 Colo. 71, 489 P.2d 323 (1971).

Use of polygraph results precluded at hearing to correct sentence. A jury determination of a defendant's guilt, which is upheld on appeal, precludes the use of the results of a polygraph examination on the issue of the defendant's guilt at a hearing to correct a sentence. *People v. Reynolds*, 638 P.2d 43 (Colo. 1981).

Department of corrections may not intervene in a criminal case in order to file a motion to correct an illegal sentence. *People v. Ham*, 734 P.2d 623 (Colo. 1987).

Appellate review precluded by the failure of the people to object at the sentencing hearing to the imposition of a sentence within the presumptive range when the defendant was convicted of possession of contraband while in a correctional institution, or to request the trial court, pursuant to this rule, to correct the sentence. *People v. Gallegos*, 764 P.2d 76 (Colo. 1988).

If court determines sentence must be vacated, if original sentence was based at least in some important part upon the testimony of witnesses at original sentencing hearing, and if original sentencing judge unavailable, there must be a new evidentiary hearing granted before a new sentence can be imposed. *People v. Chetelat*, 833 P.2d 771 (Colo. App. 1991).

Rule does not provide a method for reviewing the punishment assessed in a punitive contempt proceeding. In order to seek relief under this rule, a person must have been convicted of a crime. Conduct that results in punitive sanctions being imposed for contempt is not a common law or statutory crime.

Benninghoven v. Dees, 849 P.2d 906 (Colo. App. 1992).

Claim that trial court's amended judgment and mittimus unlawfully increased defendant's sentence should have been brought as a motion to correct an illegal sentence. *Graham v. Cooper*, 874 P.2d 390 (Colo. 1994) (decided prior to 2004 amendment).

A claim that the trial court aggravated a sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is cognizable under section (c) and not section (a). *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Court order that changed sentence by eliminating suspended portion of it constituted an imposition of a sentence within the meaning of section (a) of this rule. Defendant was entitled, therefore, to proceed under section (a) to obtain relief. *People v. Sisson*, 179 P.3d 193 (Colo. App. 2007).

Where defendant's challenge alleges that department of corrections (DOC) sentenced him under the wrong discretionary parole statute, section (a) does not give the trial court the authority to decide the issues raised in the defendant's motion because defendant's challenge was not to his sentence, but rather to an act of the DOC. *People v. Huerta*, 87 P.3d 266 (Colo. App. 2004).

The court properly corrected illegal sentence, pursuant to a motion under section (c), but preserved provisions of valid and legal plea agreement. *People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000).

By entering into a plea agreement, defendant waives his or her *Apprendi* right to have any fact (the crime of violence charge) that increases the penalty beyond the prescribed maximum submitted to a jury and proved beyond a reasonable doubt. The plea agreement stated defendant waived his right to a jury trial and the right to have every element proven beyond a reasonable doubt. Thus, by pleading guilty the defendant waived the right to a factual basis for the charge and in effect admitted beyond a reasonable doubt the elements of the offense. *People v. Munkus*, 60 P.3d 767 (Colo. App. 2002); *People v. Andracki*, 68 P.3d 526 (Colo. App. 2002).

In the case of the defendant's plea agreement, the term "illegal sentence" should be given its plain and ordinary meaning. Defendant's plea agreement did not use that term in the sense that it is used in this rule. In interpreting a plea agreement, the court focuses on the meaning a reasonable person would have attached to the agreement at the time the agreement was entered into. A reasonable person would understand the term "illegal sentence" as used in defendant's plea agreement to mean a sentence that is unlawful in some way. Defendant did not violate her plea agreement because

the agreement did not waive her right to raise a challenge under *Blakely v. Washington*, 542 U.S. 296, 24 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), to her aggravated sentence on appeal. Because defendant did not violate her plea agreement, the prosecution cannot withdraw from it. *People v. Barton*, 174 P.3d 786 (Colo. 2008).

Failure to consider and fix amount of restitution at sentencing results in illegal sentence. *People v. Dunlap*, 222 P.3d 364 (Colo. App. 2009).

Finality of judgment of conviction not affected by illegal sentence due to failure to consider and fix restitution at time of sentencing in circumstances where defendant has already directly appealed conviction and lost and, likewise, has failed to obtain postconviction relief from trial court and review by appellate court. Defendant may neither appeal anew from original conviction or the denial of a post-conviction motion, nor may defendant seek application of cases announced after the conclusion of the direct appeal. *People v. Dunlap*, 222 P.3d 364 (Colo. App. 2009).

Exclusion of DNA evidence not required. Where DNA evidence was obtained from defendant as a condition of probation as part of a plea bargain that resulted in an illegal sentence, the case does not implicate the judicially created exclusionary rule: (1) Constitutional error did not involve the police; and (2) the conduct failed the "assessment of flagrancy" test in that the conduct was not sufficiently deliberate that exclusion could meaningfully deter it. *People v. Glasser*, __ P.3d __ (Colo. App. 2011).

Defendant's claim that the trial court erred in determining the amount of restitution is timed barred. Defendant is neither challenging the statutory basis for the award of restitution nor the court's subject matter jurisdiction to enter the order, but the manner in which the restitution hearing was conducted. A claim that the sentence was imposed in an illegal manner must be brought within 120 days. *People v. Bowerman*, 258 P.3d 314 (Colo. App. 2010).

Guilty verdicts for both attempted after deliberation first degree murder and attempted extreme indifference first degree murder did not require inconsistent findings of fact; therefore, the sentences were not illegal. The information alleged different victims for the different charges, so it is not inconsistent to conclude that defendant had the specific intent to take the life of the specific targets and also showed an extreme indifference to life in general to the other persons. *People v. Stovall*, 2012 COA 7, __ P.3d __.

III. REDUCTION OF SENTENCE.

A. In General.

Rule constitutional. Section (b) is a valid procedural rule promulgated pursuant to the

rule-making power of the supreme court under § 21 of art. VI, Colo. Const., and it does not encroach upon the governor's exclusive power of commutation under § 7 of art. IV, Colo. Const. *People v. Smith*, 189 Colo. 50, 536 P.2d 820 (1975).

As section (b), which suspends the finality of the conviction for a period of 120 days from the time sentence is imposed, or for 120 days after final disposition on appeal, to allow the filing of a motion for a reduction of sentence in the trial court, suspends the concept of finality of a criminal judgment of conviction, the rule does not offend the separation of powers doctrine under art. III, Colo. Const., nor the executive power of commutation. The court retains jurisdiction during the 120-day period for the filing of a motion for reduction of sentence. *People v. Smith*, 189 Colo. 50, 536 P.2d 820 (1975).

Rule allows court to reconsider, in interests of justice, the sentence previously imposed, in the light of all relevant and material factors in the particular case which may or may not have been initially considered by the court and, in its sound discretion, to resentence the defendant to a lesser term within the statutory limits. *People v. Smith*, 189 Colo. 50, 536 P.2d 820 (1975); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980).

This rule provides the trial court an opportunity to reconsider, in the interest of justice, a sentence previously imposed. *Spann v. People*, 193 Colo. 53, 561 P.2d 1268 (1977).

The purpose of section (b) is to permit the trial court to reexamine the propriety of a sentence previously imposed. *People v. Lyons*, 44 Colo. App. 126, 618 P.2d 673 (1980).

But section (b) cannot expand the trial court's authority in resentencing beyond that which it had initially. Death penalty statute, as it existed in 1993, mandated that a death sentence shall be binding unless the court, pursuant to the statute, determines the verdict was clearly erroneous. The trial court's determination that the sentence was not clearly erroneous, therefore, precludes granting postconviction relief under section (b) of this rule. *People v. Dunlap*, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

But failure to appeal initial sentence forecloses later challenge. A defendant who fails to appeal an initial sentence is foreclosed from challenging that sentence later by means of motion under section (b). *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981) (but see *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980)); *Swanson v. People*, 712 P.2d 479 (Colo. 1986).

More than one sentence reduction is not permitted by former § 16-11-309 when read in conjunction with this rule. Although multiple sentence reductions are permitted under this rule if the sentence is reduced to a term within

statutory limits, more than one sentence reduction under former § 16-11-309 would be outside the statutory limits. *People v. Belgard*, 58 P.3d 1077 (Colo. App. 2002).

Jurisdiction to modify sentence retained only until conviction final. A trial court retains jurisdiction to take a "second look" at a sentence previously imposed only before the judgment of conviction underlying the sentence has become final. *People v. Lyons*, 44 Colo. App. 126, 618 P.2d 673 (1980); *Swainson v. People*, 712 P.2d 479 (Colo. 1986).

If an illegal sentence is imposed, the time for filing a Crim. P. 35(b) motion does not start to run. The time period is triggered only by the imposition of a legal sentence. *People v. Dean*, 894 P.2d 13 (Colo. App. 1994).

And conviction final 120 days after sentence imposed or appellate process concluded. For purposes of the rule's sentence reduction provisions, a conviction is final 120 days after the imposition of sentence when that conviction is not appealed, and 120 days after the conclusion of the appellate process if the conviction or sentence is directly appealed. *People v. Lyons*, 44 Colo. App. 126, 618 P.2d 673 (1980); *Swainson v. People*, 712 P.2d 479 (Colo. 1986).

Where the defendant does not appeal his conviction but, some years later, challenges his conviction by a motion under section (c), which motion is denied by the trial court, the court of appeals' affirmance of the trial court's denial is not a "judgment" of that court "having the effect of upholding a judgment of conviction" and, thus, does not trigger a new 120-day period for filing a section (b) motion for reduction of sentence. *People v. Akins*, 662 P.2d 486 (Colo. 1983).

Timely filing of a Crim. P. 35(b) motion suspends finality of sentence while the court reconsiders the original sentence. There is no support for the view that a sentence is final once a mandate is received. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

Framework for review of motions under section (b). First, the reviewing court must determine the timeliness of the motion, considering both when it is filed and when it is heard. The defendant's motivation for any delay attributable to the defendant is relevant to this determination, but delays that result from the court's inability to hear the matter should not be assessed against the defendant. Second, the court may consider all evidence presented at the hearing. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

Section (b) of this rule does not limit the evidence the trial court may consider. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

Decision to reduce a sentence is entrusted to the sound discretion of the trial court. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

Defendant required to file motion for reduction of sentence within 120 days after the date of successful completion of regimented inmate training program. This rule provides a 120-day time limitation for the filing of a motion for reduction of sentence, and § 17-27.7-104 requires that a motion to reduce sentence must be brought pursuant to Crim. P. 35(b). *People v. Campbell*, 75 P.3d 1151 (Colo. App. 2003).

Jurisdiction retained after 120 days. If the defendant was unconstitutionally deprived of the opportunity to file his motion because of ineffective assistance of counsel, the trial court would have jurisdiction 120 days after the sentence is imposed and could extend the time limit for filing. *Swainson v. People*, 712 P.2d 479 (Colo. 1986).

Therefore, it was error for the district court to dismiss defendant's motion without making any factual findings, on his claim of ineffective assistance of counsel. *Swainson v. People*, 712 P.2d 479 (Colo. 1986).

One hundred twenty days to file a motion is not extended by Crim. P. 45 based upon family considerations or lack of knowledge of the law. The only excusable neglect recognized for extending the time to file a rule 35 motion is ineffective assistance of counsel. *People v. Delgado*, 83 P.3d 1144 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 634 (Colo. 2005).

Defendant should not be penalized for pursuing his right of appeal, or for any delay in deciding that matter. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

But, change in parole board policy not grounds for modification of defendant's sentence under subsection (c)(2)(v), and section (b) does not provide basis for review of a sentence if motion filed beyond 120-day time period required by rule. *People v. Sorenson*, 824 P.2d 38 (Colo. App. 1991).

When defendant has filed a motion for reduction of sentence within 120 days after the imposition of sentence, this rule vests the court with jurisdiction to rule on the motion for a reasonable period of time after the expiration of the 120-day filing period. If the court fails to rule within a reasonable period of time, and the defendant fails to take reasonable efforts to secure an expeditious ruling on the motion, the motion may be deemed abandoned. *People v. Fuqua*, 764 P.2d 56 (Colo. 1988); *People v. Cagle*, 807 P.2d 1233 (Colo. App. 1991); *Herr v. People*, 198 P.3d 108 (Colo. 2008).

Delay for the purpose of establishing a record of good behavior in the department of corrections is impermissible. A Crim. P. 35(b) motion is not a license to wait and reevaluate the sentencing decision in the light of subsequent developments. *People v. Piotrowski*, 855 P.2d 1 (Colo. App. 1992); *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

Burden of going forward with motion pursuant to section (b) is on the defendant and a delay of 532 days is unreasonable and indicates that defendant abandoned the motion. *Mamula v. People*, 847 P.2d 1135 (Colo. 1993).

Appeal of final judgment terminates trial court jurisdiction and does not restore it until the events described in subsections (2) and (3) of section (b) take place. *People v. District Court*, 638 P.2d 65 (Colo. 1981).

Executive branch authorized to modify sentence after conviction final. The executive branch of government, not the judiciary, has the sole authority to modify a legally imposed criminal sentence after the conviction upon which it is based has become final. *People v. Lyons*, 44 Colo. App. 126, 618 P.2d 673 (1980).

Power to alter sentence at time of revocation of probation is explicitly recognized in § 16-11-206 (5), Crim. P. 32(f)(5), and section (b) of this rule. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977) (decided prior to 1979 amendment of this rule).

Court obligated to exercise discretion in deciding whether to modify previously imposed sentence. The court has an affirmative obligation to exercise judicial discretion in deciding whether to modify the sentence previously imposed and to base the decision on relevant evidence, not personal whim. *Spann v. People*, 193 Colo. 53, 561 P.2d 1268 (1977); *People v. Culbertson*, 198 Colo. 153, 596 P.2d 1200 (1979); *People v. Dunlap*, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

Implicit in a proceeding pursuant to section (b) is the duty of the trial court to use its discretion when considering the defendant's motion. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980); *People v. Ellis*, 873 P.2d 22 (Colo. App. 1993).

Where evidence in support of defendant's section (b) motion was nearly identical to that presented at the sentencing hearing, trial court effectively considered all relevant evidence, and the findings it made at the sentencing hearing were sufficient to support its later exercise of discretion in denying defendant's motion. *People v. Busch*, 835 P.2d 582 (Colo. App. 1992); *People v. Dunlap*, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

And is trial court's duty to consider all relevant and material factors, including new evidence, as well as facts known at the time the original sentence was pronounced. *Spann v. People*, 193 Colo. 53, 561 P.2d 1268 (1977); *People v. Culbertson*, 198 Colo. 153, 596 P.2d 1200 (1979); *People v. Ellis*, 873 P.2d 22 (Colo. App. 1993).

The trial court in proceedings pursuant to section (b) must consider all relevant and material factors which may affect the decision on

whether to reduce the original sentence. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

But judicial discretion is not personal discretion. Judicial discretion cannot be distorted to camouflage or insulate from appellate review a decision based on the judge's personal caprice, hostility, or prejudice. *Spann v. People*, 193 Colo. 53, 561 P.2d 1268 (1977).

Personal whim, hostility, or prejudice must not be basis for trial court's decision. *People v. Culbertson*, 198 Colo. 153, 596 P.2d 1200 (1979).

Court considering a motion for reduction of sentence filed pursuant to § 17-27.7-104 must give complete consideration to all pertinent information provided by the offender, the offender's attorney, and the district attorney. *People v. Smith*, 971 P.2d 1056 (Colo. 1999).

Trial court properly exercised judicial discretion under this section and complied with requirements of § 17-27.7-104 where, after careful review of case file, pre-sentence report, recommendation from regimented training program, and documents submitted by defendant, defendant's attorney, and prosecution, the court concluded that crime of vehicular assault was serious enough to warrant denial of motion for sentence reduction after completion of regimented inmate training program under § 17-27.7-103. *People v. Ellis*, 873 P.2d 22 (Colo. App. 1993).

Trial court gave complete consideration to defendant's Crim. P. 35(b) motion even though the record did not contain any information provided by defendant, his attorney, or the district attorney after defendant's acceptance into the regimented inmate training program. The court should not be precluded from ruling on defendant's motion simply because none of those entitled to provide additional information to the court chose to do so. *People v. Morales-Uresti*, 934 P.2d 856 (Colo. App. 1996).

Defendant's argument that his denial for sentence reduction was based on race was without merit. Although defendant alleged that because he was African-American, he had been treated more harshly than a Caucasian inmate whose sentence had been modified, the two offenders were convicted of different offenses. *People v. Ellis*, 873 P.2d 22 (Colo. App. 1993).

District attorney may withdraw from plea agreement when judge modifies sentence imposed. If a trial judge in the exercise of his discretion under this rule modifies or reduces a sentence imposed pursuant to a plea agreement, the district attorney must be permitted, in his discretion, to withdraw from the plea agreement, reinstate the charges which were dismissed, and proceed to trial as though no agreement had been made. *People ex rel. VanMeveren v. District Court*, 195 Colo. 34, 575 P.2d 4 (1978).

But district attorney not permitted to withdraw from plea agreement when sentence reduced pursuant to the regimented inmate training program in § 17-27.7-104. Because the plea agreement did not foreclose the future possibility of a reduction in sentence, the court-ordered sentence reduction could not amount to a substantial and material breach of the agreement between the parties. *Keller v. People*, 29 P.3d 290 (Colo. 2000).

Generally, ruling on section (b) motion deemed final judgment, reviewable on appeal. When the trial court rules on a defendant's motion, filed pursuant to section (b), it is a final judgment as to the issue raised, and such ruling, except where the issue is propriety of sentence, is reviewable on appeal to the appropriate court. *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980).

There is no right of appeal as to a trial court's denial of a motion for reduction of sentence under this rule when the issue presented to and resolved by the court concerns the propriety of the sentence. *People v. Busch*, 835 P.2d 582 (Colo. App. 1992).

Standard of review of sentencing by trial court is whether court abused discretion. *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979), rev'd on other grounds, 199 Colo. 314, 618 P.2d 1101 (1980); *People v. Hudson*, 709 P.2d 77 (Colo. App. 1985).

And decision not reversed on appeal absent abuse. Absent an abuse of discretion, the decision of the reviewing court on a motion for the reduction of sentence under this rule will not be reversed. *People v. Sundstrom*, 638 P.2d 831 (Colo. App. 1981).

American bar association standards relating to appellate review of sentences were used by court of appeals to review sentence imposed by trial court. *People v. Hudson*, 709 P.2d 77 (Colo. App. 1985).

Disjunctive provisions of section (b) intended to recognize the different times at which a sentence might become final. *People v. Cagle*, 807 P.2d 1233 (Colo. App. 1991).

Defendant cannot appeal motion's denial where issue one of propriety of sentence. A defendant has no right to appeal a denial of his motion filed pursuant to section (b) where the issue before the appellate court is the propriety of his sentence. *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *McKnight v. People*, 199 Colo. 313, 607 P.2d 1007, cert. denied, 449 U.S. 873, 101 S. Ct. 214, 66 L. Ed. 2d 94 (1980); *People v. Kerns*, 629 P.2d 102 (Colo. 1981).

Where the intrinsic fairness of defendants' sentence is reviewed by the trial court in proceedings pursuant to section (b), those determinations are not reviewed again on appeal. *People v. Lopez*, 624 P.2d 1301 (Colo. 1981).

An argument challenging the intrinsic fairness of the sentence imposed and not the sentencing procedure utilized by the trial court will not be reconsidered on appeal to the supreme court. *People v. Nemnich*, 631 P.2d 1121 (Colo. 1981).

There is no right of appeal to the denial by a trial court of a section (b) motion where the issue presented and resolved concerns the propriety of the sentence. *People v. Dennis*, 649 P.2d 321 (Colo. 1982).

Or where issue treated as such. An appeal of the trial court's reduction of the defendant's sentence pursuant to this rule, seeking a further reduction of the sentence, is treated as an appeal of the "denial" of a section (b) motion raising the issue of the "propriety of the sentence", and is therefore dismissed. *People v. Foster*, 200 Colo. 283, 615 P.2d 652 (1980).

Court may not sua sponte treat section (b) proceeding as section (c) proceeding. *People v. Guitron*, 191 Colo. 284, 552 P.2d 304 (1976).

Failure of trial court to exercise any discretion renders proceeding defective. The failure of a trial court to exercise any discretion at all in reviewing a section (b) motion in effect renders the proceeding itself defective, and an appeal therefrom directly raises the issue of the propriety of that proceeding. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Such as where court refuses to consider mitigation information or make findings. It is only in such situations where the trial court has refused to consider any information in mitigation and does not make findings in support of its decision, that an error in denying a section (b) motion is sufficient to invoke appellate jurisdiction. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Where trial judge acts arbitrarily or capriciously, judgment vacated. Where the trial court exercises its discretion arbitrarily or capriciously, basing its decision to deny the petitioner's motion under section (b) on personal considerations rather than on the evidence, the trial court's judgment is vacated, and the motion is remanded for a prompt hearing before a different trial judge. *Spann v. People*, 193 Colo. 53, 561 P.2d 1268 (1977).

Facts constituting abuse of discretion regarding court denial of work-release program. *People v. Morrow*, 197 Colo. 244, 591 P.2d 1026 (1979).

Court may not increase an offender's original sentence unless it was erroneously imposed or is void. *Downing v. People*, 895 P.2d 1046 (Colo. 1995).

Term of imprisonment that was longer than offender's original sentence constituted an increase in the sentence for purposes of section (b), regardless of whether the sentence was served in a community corrections facility un-

der less severe conditions. *Downing v. People*, 895 P.2d 1046 (Colo. 1995).

Since the granting of probation greatly reduces the level of restraint imposed on defendant, essentially allowing him to remain at liberty while complying with the terms of his probation, it does constitute a reduction under section (b), even when the length of the sentence increased. *People v. Santana*, 961 P.2d 498 (Colo. App. 1997).

B. Proportionality Review.

Proportionality determinations are reviewed de novo on appeal, because an appellate court is not bound by a trial court's conclusions of law. *People v. Medina*, 926 P.2d 149 (Colo. App. 1996).

Three-part test adopted by U.S. supreme court in *Solem v. Helm* applies when reviewing proportionality of sentences under habitual-criminal statutes: (1) The gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *People v. Cisneros*, 855 P.2d 822 (Colo. 1993).

Request for proportionality review alleging that sentence violates the eighth amendment to the U.S. constitution is subject to the limitation period set forth in § 16-5-402. *People v. Moore-El*, 160 P.3d 393 (Colo. App. 2007).

Concurrent life sentences held disproportionate where underlying crimes were relatively minor, none posed a major threat to society, and although defendant had a lengthy record, approval of a life sentence under the circumstances would drastically lower the "grave and serious" threshold. *People v. Medina*, 926 P.2d 149 (Colo. App. 1996).

IV. OTHER POSTCONVICTION REMEDIES.

A. General Purpose and Scope of Postconviction Review.

Postconviction relief is founded upon constitutional principles. *People v. Bucci*, 184 Colo. 367, 520 P.2d 580 (1974).

Rule is concerned with the validity of a sentence and judgment. *Saiz v. People*, 156 Colo. 43, 396 P.2d 963 (1964).

A request for return of property is not within the scope of this rule, which is limited to challenges to a defendant's conviction or sentence. *People v. Wiedemer*, 692 P.2d 327 (Colo. App. 1984).

Court may not sua sponte treat section (b) proceeding as section (c) proceeding. Where the proceeding is simply a proceeding under section (b) for the reduction of sentence, it is

not within the province of the court, sua sponte, to treat it as a proceeding under section (c) and pass upon whether the defendant's guilty plea should be set aside, even though it is argued that the reduction was a part of a plea bargaining. *People v. Guitron*, 191 Colo. 284, 552 P.2d 304 (1976).

Unless motion clearly raises section (c) issues. Where the defendant's motion seeks relief under section (b), but in substance it clearly raises issues and seeks relief available under section (c), the motion should be considered a motion for postconviction relief under section (c). *People v. Ivery*, 44 Colo. App. 511, 615 P.2d 80 (1980).

Rule sets forth standards and procedure for postconviction relief. This rule sets the applicable standards and procedure required of a court when a motion to vacate, set aside, or correct a sentence is filed. *Roberts v. People*, 158 Colo. 76, 404 P.2d 848 (1965).

And this rule similar to federal provision. Section (c) of this rule provides a method for postconviction relief to those sentenced by state courts in Colorado which is substantially the same as that of 28 U.S.C. § 2255. *Henry v. Tinsley*, 344 F.2d 109 (10th Cir. 1965); *Ruark v. Tinsley*, 350 F.2d 315 (10th Cir. 1965); *Saxton v. Patterson*, 370 F.2d 112 (10th Cir. 1966); *Breckenridge v. Patterson*, 374 F.2d 857 (10th Cir. 1967), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967).

Section (c) of this rule authorizes postconviction relief without regard to time limitations for any sentence that "exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law". *People v. Emig*, 676 P.2d 1156 (Colo. 1984).

Rule creates entirely new postconviction remedy. Section (c) of this rule is intended to fill the void created by the narrowness of the Colorado concept of "habeas corpus" by creating an entirely new postconviction remedy. *Peters v. Dillon*, 227 F. Supp. 487 (D. Colo. 1964), aff'd, 341 F.2d 337 (10th Cir. 1965).

And attains same purpose as obsolete "habeas corpus" writ. The writ of "habeas corpus coram nobis" being obsolete, its purpose now is attained by the filing of a motion to set aside judgment. *Grandbouche v. People*, 104 Colo. 175, 89 P.2d 577 (1939); *Hackett v. People*, 158 Colo. 304, 406 P.2d 331 (1965).

This rule affords all remedies which are available through writ of "habeas corpus". *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972); *People v. Santisteven*, 868 P.2d 415 (Colo. App. 1993).

Section (c) affords a convicted person all the remedies which are available through a writ of habeas corpus. *People v. Bucci*, 184 Colo. 367, 520 P.2d 580 (1974).

An improperly filed *pro se* habeas corpus petition should be treated as a Crim. P. 35(c) motion in order to provide review on the merits of the claims raised by a petitioner. *Chatfield v. Colo. Court of Appeals*, 775 P.2d 1168 (Colo. 1989).

Pro se habeas corpus petition was improperly filed in case where an invalid judgment of conviction and sentence were rendered since relief was available under this rule and Crim. P. 36 and the district court should have treated petition as motion under subsection (c)(2) of this rule. *Kailey v. Colo. Dept. of Corr.*, 807 P.2d 563 (Colo. 1991).

Rather than dismissing an improper habeas corpus petition, the court should convert such petition into a motion under section (c) of this rule where the petitioner is acting *pro se*, the petitioner raises issues in the habeas corpus petition which should have been raised in a motion under section (c) of this rule, and the petitioner's claims are not barred by the statute of limitations. *Graham v. Gunter*, 855 P.2d 1384 (Colo. 1993).

"Habeas corpus" is not proper remedy to gain review of purported constitutional violations. *Breckenridge v. Patterson*, 374 F.2d 857 (10th Cir. 1967), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19, L. Ed. 2d 56 (1967).

Rather, the proper procedure is motion under this rule, followed by an appeal. *Breckenridge v. Patterson*, 374, F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967).

And "habeas corpus" petition raising constitutional questions treated as motion under this rule. Where the issues before a trial court in a "habeas corpus" proceeding raise substantive constitutional questions, the issues are within the purview of postconviction remedy, and the petition for "habeas corpus" will be treated as a motion under section (c). *Dodge v. People*, 178 Colo. 71, 495 P.2d 213 (1972).

Under subsection (c)(3), the court must hold an evidentiary hearing unless the motion, the files, and the record of the case clearly establish that the allegations presented in the motion are without merit and do not warrant postconviction relief. *White v. Denver District Court*, 766 P.2d 632 (Colo. 1988).

A habeas corpus petition that seeks relief available under this rule should be treated as a Crim. P. 35 motion based upon the substantive constitutional issues raised therein, rather than upon the label placed on the pleading. *White v. Denver Dist. Ct.*, 766 P.2d 632 (Colo. 1988); *DePineda v. Price*, 915 P.2d 1278 (Colo. 1996).

Defendant's challenges to procedures by which he was sentenced rather than the legality of his confinement may be raised by means of a motion under section (c) but not

by means of a habeas corpus petition. *Jones v. Zavaras*, 926 P.2d 579 (Colo. 1996).

Prisoner required to pursue remedies under rule before petitioning for "habeas corpus". The requirement that a prisoner must pursue his remedies under this rule before petitioning for "habeas corpus" does not constitute a suspension of the writ of "habeas corpus". *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972).

So trial court judge abuses discretion when prematurely proceeds with "habeas corpus" hearing. When a motion for postconviction relief is heard and denied by one trial court judge and an appeal is pending, if the defense attorney files a "habeas corpus" petition on the same grounds, it is an abuse of discretion for a second trial court judge to proceed with a hearing on the "habeas corpus" petition. *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972).

A motion under section (c) must be filed in the sentencing court because that court maintains the records relating to the conviction and sentence. *Jones v. Zavaras*, 926 P.2d 579 (Colo. 1996).

Defendant may proceed *pro se* during postconviction proceedings pursuant to this rule. *People v. Jones*, 665 P.2d 127 (Colo. App. 1982).

Contention that defendant has been wrongfully deprived of confinement credit is properly put forward in a motion under this rule at the time when defendant claims a right to be released. *People v. Lepine*, 744 P.2d 81 (Colo. 1987).

An order of a trial court granting or denying a motion filed under section (c) of this rule is a final order reviewable on appeal. Such order becomes final after the period in which to perfect an appeal expires. *People v. Janke*, 852 P.2d 1271 (Colo. App. 1992).

This rule governing postconviction remedies did not provide basis for granting habeas corpus relief where petition was not filed under postconviction rule, even though petition was assigned case number of petitioner's original criminal action. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

Defendant's motion does not seek relief from the judgment and sentence of the trial court but rather against the department of corrections. Therefore, it is not a claim cognizable under section (c). *People v. Carrillo*, 70 P.3d 529 (Colo. App. 2002).

This rule does not address postconviction claim that defendant is being unconstitutionally denied the opportunity to be considered for parole. *Naranjo v. Johnson*, 770 P.2d 784 (Colo. 1989).

Former clients are not required to obtain postconviction relief before bringing a malpractice action against their criminal defense

attorneys. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).

The doctrine of issue preclusion can be used under appropriate circumstances to prevent a criminal defendant from relitigating issues that have been decided against him or her in a motion under section (c) in a subsequent malpractice suit. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).

Failure to seek or obtain postconviction relief is not a bar to bringing a malpractice suit. *Smith v. Truman*, 115 P.3d 1279 (Colo. 2005).

When a postconviction claim is properly presented for evaluation on the merits, but is premised on trial error that was not preserved, the court must review the claim for plain error, employing the prejudice test articulated in *Wilson v. People*, 743 P.2d 415 (Colo. 1987). *People v. Versteeg*, 165 P.3d 760 (Colo. App. 2006).

B. When Review Available.

Previously, this rule was entitled "Post Conviction Remedy for Prisoner in Custody". *Hudspeth v. People*, 151 Colo. 5, 375 P.2d 518 (1962), cert. denied, 375 U.S. 838, 84 S. Ct. 82, 11 L. Ed. 2d 66 (1963).

And previously limited to prisoner in custody. This rule was once expressly limited to where a prisoner was attacking a sentence under which he was "then" in custody. *Hackett v. People*, 158 Colo. 304, 406 P.2d 331 (1965).

Such as person to whom probation granted. A person to whom probation has been granted is considered to be in "custody under sentence" and may raise a question as to whether his plea was voluntary. *People v. Burger*, 180 Colo. 415, 505 P.2d 1308 (1973).

Presently, court cannot deny motion for sole reason petitioner not in custody. At the present time, on a sufficient section (c) motion, a trial court would not be justified in summarily denying the motion for the sole reason that a petitioner is not in custody under sentence pursuant to a conviction which he seeks to vacate. *Hooker v. People*, 173 Colo. 226, 477 P.2d 376 (1970).

And this rule now applies to one who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside. *Hooker v. People*, 173 Colo. 226, 477 P.2d 376 (1970).

A defendant who enters a guilty plea is entitled to file a Crim. P. 35(c) motion based on newly discovered evidence, and the rule does not limit postconviction review to those who have been convicted after trial or after entering an Alford plea. *People v. Mason*, 997 P.2d 1245 (Colo. App. 1999), aff'd on other grounds, 25 P.3d 764 (Colo. 2001).

Postconviction relief is presently available where constitutional rights have been vio-

lated during trial. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Where defendant contended that the trial court imposed its sentence in an illegal manner, and not that it was an illegal sentence, defendant was required to file his motion within 120 days of the imposition of sentence. *People v. Swainson*, 674 P.2d 984 (Colo. App. 1983).

Motion to dismiss may be treated as one filed pursuant to this rule. Where a motion to dismiss is filed after the defendant has pleaded guilty to and is sentenced for the charge involved, the trial court may elect to treat the motion as one filed pursuant to this rule. *Wixson v. People*, 175 Colo. 348, 487 P.2d 809 (1971).

And review provided subsequent to appeal. The very purpose of a section (c) motion is to provide a postconviction remedy subsequent to an appeal to review constitutional errors made at trial. *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

Or where time for appeal has passed. This rule provides for postconviction remedies to attack an unconstitutionally conducted trial although the time for appeal has passed. *Baca v. Gobin*, 165 Colo. 593, 441 P.2d 6 (1968).

And in spite of fact appeal was dismissed for failure to file the requisite motion for new trial, and that the alleged error could have been raised had such an appeal been properly brought, nevertheless, where the error asserted would be a violation of a constitutionally protected right, it may be raised in a section (c) motion. *Sackett v. People*, 176 Colo. 18, 488 P.2d 885 (1971).

Motion based upon change in law may be filed before conviction becomes "final". Motions pursuant to section (c) and § 18-1-410 (1)(f) may be filed at any time before the conviction becomes "final", which does not take place until the date when a petition for rehearing, timely filed, has been denied. *Litsey v. District Court*, 193 Colo. 341, 565 P.2d 1343 (1977) (decided prior to 1979 amendment).

Where an appellant files a motion for a postconviction review of his sentence based on a significant change in the law before his conviction becomes "final", the court has jurisdiction to entertain his motion for relief. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Relief from a validly imposed sentence because of amendatory legislation is only available if requested before a conviction becomes final. *People v. Johnson*, 638 P.2d 61 (Colo. 1981).

Authority to modify sentence after conviction final. After a conviction has become final, relief from a validly imposed sentence cannot be obtained through the judiciary but must instead be sought through the executive department by way of commutation. *People v. Akins*,

662 P.2d 486 (Colo. 1983); *People v. Piotrowski*, 855 P.2d 1 (Colo. App. 1993).

The limitations of § 16-5-402 are applicable to a proportionality review of a sentence imposed pursuant to the habitual criminal statutes. *People v. Talley*, 934 P.2d 859 (Colo. App. 1996).

Because § 16-5-402 (1.5) is discretionary and because defendant's motion was premised on recent authority of constitutional magnitude, appellate court addressed the motion despite its untimeliness. *People v. Gardner*, 55 P.3d 231 (Colo. App. 2002).

Defendant need not affirmatively assert that relief sought has not been previously denied, although an appeal duplicating an appeal previously denied may be dismissed. *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992).

Issue raised on appeal may be reviewed when Crim. P. 35(b) motion was inadvertently excluded from remainder of record transmitted to court and exclusion was not appellant's fault. *People v. Olivas*, 911 P.2d 675 (Colo. App. 1995).

Review is appropriate when issues concern the sentencing proceeding and not the propriety of sentence itself. *People v. Olivas*, 911 P.2d 675 (Colo. App. 1995).

Claims related to the department of corrections' sex offender classification are not reviewable under Crim. P. 35(c)(2). The proper claim is suit against the department of corrections. *People v. McMurrey*, 39 P.3d 1221 (Colo. App. 2001).

Ripeness of claim for review. Subsections (c)(2) and (3) require an allegation that the applicant has a present right to be released because the sentence was imposed in violation of the constitution or laws of the United States or of Colorado and the sentence imposed was not in accordance with the sentence authorized by law. *People v. Shackelford*, 729 P.2d 1016 (Colo. App. 1986).

Convict, who alleged that the department of corrections was incorrectly computing good-time credits for purposes of parole eligibility but who did not assert any defect in the sentence imposed upon him, and who presented his claim prior to the time when, even by his own calculations, he would be eligible for parole, did not present a dispute that was ripe for adjudication and did not state a cognizable claim. *People v. Shackelford*, 729 P.2d 1016 (Colo. App. 1986).

State waived time bar to Crim. P. 35(c) motion by not raising it in trial court. *People v. St. John*, 934 P.2d 865 (Colo. App. 1996).

When defendant entitled to review even though sentence served. When a defendant has completed service of a sentence and belatedly seeks postconviction relief, he may be charged with the burden of showing a present need for

such relief. A sufficient showing is made when the defendant establishes that he is facing prosecution or has been convicted and the challenged conviction or sentence may be, or has been, a factor in sentencing for the current offense. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

A claim under this rule is not barred by a failure to challenge the conviction earlier as long as a postconviction motion states a claim cognizable under this rule, such as where the motion asserts facts which, if true, would invalidate a previously entered guilty plea, and the claim has not been fully and finally resolved in a prior judicial proceeding, the defendant is entitled to judicial review of the asserted error. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

A person seeking postconviction relief must allege with particularity in his motion that present need exists for relief sought and the present need must continue to exist until the time of the hearing on motion and, if a new present need arises prior to a hearing on motion for postconviction relief, defendant may amend his original pleading to reflect the change. *Moland v. People*, 757 P.2d 137 (Colo. 1988).

Appellate court cannot review allegations not raised in a motion or hearing under section (c). *People v. Goldman*, 923 P.2d 374 (Colo. App. 1996).

Constitutional error alleged need no longer be of sort not subject to appellate review. There is no longer any adherence to the rule that the constitutional error alleged must be of a sort not effectively subject to review on appeal from a conviction. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969); *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

The fact that defendant did not raise a constitutional claim on direct appeal does not preclude the defendant from raising the claim in a motion under section (c) or from seeking appellate review of the trial court's denial of such a motion. The defendant is entitled to review of a motion under this rule so long as the motion states a claim cognizable under this rule and the claim has not been fully and finally resolved in a prior judicial proceeding. *People v. Corichi*, 18 P.3d 807 (Colo. App. 2000).

Defendant who has voluntarily and knowingly waived right to contest validity of prior convictions cannot apply for postconviction relief under section (c). *People v. Gurule*, 748 P.2d 1329 (Colo. App. 1987).

But this rule is not a substitute for appeal or writ of error. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

A motion under this rule is not a substitute for a writ of error. *People v. Crawford*, 183 Colo. 166, 515 P.2d 631 (1973).

And constitutional error previously dis-

posed of on appeal cannot be raised again. An error consisting of a violation of constitutional rights of a defendant may be raised in a section (c) proceeding so long as it was not previously raised and disposed of on appeal. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969); *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

Where various matters raised in a motion under this rule have been considered on appeal and no constitutional issues are raised, the motion should be denied without hearing, as provided in this rule. *McKenna v. People*, 160 Colo. 369, 417 P.2d 505 (1966).

Where a question is reviewed in depth in connection with the defendant's appeal, the matter is not subject to further review under section (c). *Moore v. People*, 174 Colo. 570, 485 P.2d 114 (1971).

Once an issue has been reviewed on appeal it cannot be raised again by a petition to vacate judgment and sentence. *Gallegos v. People*, 175 Colo. 553, 488 P.2d 887 (1971).

Unless otherwise required in the interests of justice, any grounds for postconviction relief which have been fully and finally litigated on a writ of error should not be relitigated. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

This rule is a vehicle for correcting errors of constitutional magnitude which were not previously raised and ruled upon. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

An issue can be raised by a section (c) motion only when the alleged error involves a constitutional right and was not previously the subject of review on a writ of error. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Equitable principles permit a motion for postconviction relief to be denied without a hearing when the ground for postconviction relief relied upon has been fully and finally litigated in the proceedings leading to judgment of conviction, including an earlier appeal, and the interests of justice do not otherwise require another hearing. *People v. Trujillo*, 190 Colo. 497, 549 P.2d 1312 (1976).

Once a claim has been raised and disposed of by the supreme court in an earlier appeal, it cannot be raised again in a later section (c) motion. *People v. Johnson*, 638 P.2d 61 (Colo. 1981); *People v. Davis*, 759 P.2d 742 (Colo. App. 1988).

As there must be some finality in reviewing process. Although section (c) is primarily intended to provide procedure which will permit judicial review of alleged constitutional infirmities in criminal proceedings, it is couched in language which recognizes that there must be some finality in the reviewing process. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Rule not intended to establish perpetual review. This rule was not intended to establish a

procedure which would allow continuing review of issues previously decided against the defendant. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Generally, this rule is not intended to provide a repetitive review of alleged errors. *Buckles v. People*, 162 Colo. 51, 424 P.2d 774 (1967).

Postconviction proceedings are provided as a method of preventing injustices from occurring after a defendant has been convicted and sentenced, but not for the purpose of providing a perpetual right of review to every defendant in every case. *People v. Hampton*, 187 Colo. 131, 528 P.2d 1311 (1974).

Second appellate review of the propriety of a sentence is prohibited. *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *People v. Jenkins*, 687 P.2d 455 (Colo. 1984).

A defendant is prohibited from using a proceeding under this rule to relitigate issues fully and finally resolved in an earlier appeal. *People v. Johnson*, 638 P.2d 61 (Colo. 1981); *DePineda v. Price*, 915 P.2d 1278 (Colo. 1996).

A defendant is precluded from raising an issue under this rule if its review would be nothing more than a second appeal. *DePineda v. Price*, 915 P.2d 1278 (Colo. 1996).

But if a significant change in the interpretation of the law, of constitutional magnitude, is determined after the defendant's direct appeal is affirmed, and if the change is binding precedent, then it is proper for the court of appeals to exercise its discretion to review the defendant's claims raised under this rule in a subsequent appeal. *People v. Close*, 22 P.3d 933 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 528 (Colo. 2002).

Rights of accused balanced against right to have final court determination. It is necessary to balance the rights of the accused to review a trial with postconviction proceedings against the right of society to have finality in court determinations. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

Thus, American Bar Association Standards for Criminal Justice are to be followed. In balancing the rights of the accused in postconviction proceedings against the recurring problems which face the courts and society, the supreme court of Colorado has elected to follow the American Bar Association Standards for Criminal Justice relating to delayed applications for relief. *People v. Hampton*, 187 Colo. 131, 528 P.2d 1311 (1974).

When appeal time expires, petitioner must show entitlement to relief. When the time for appeal has expired, there must be a showing by the petitioner that he would be entitled to relief under section (c). *Valdez v. District Court*, 171 Colo. 436, 467 P.2d 825 (1970).

As must defendant who has completed challenged sentence. Where the defendant seeking postconviction relief has completed the

sentences which were imposed on his challenged convictions, he has the burden of establishing a present need for relief under this rule. *People v. Hampton*, 187 Colo. 131, 528 P.2d 1311 (1974).

Where the defendant has long since served his sentence, time has dimmed memories, and court records are misplaced or unavailable, the defendant has the burden of demonstrating a present need for section (c) relief. *People v. Bucci*, 184 Colo. 367, 520 P.2d 580 (1974).

A defendant who has fully discharged the sentence imposed against him and any parole obligation associated with the sentence, but who has made no further showing of the present need for relief, is not entitled to relief under section (c) of this rule. *People v. Graham*, 793 P.2d 600 (Colo. App. 1989).

Motions under section (c) are subject to § 16-5-402 (1), which prohibits a person convicted under a criminal statute from collaterally attacking the validity of the conviction unless the attack is commenced within three years of the conviction. *People v. Green*, 36 P.3d 125 (Colo. App. 2001); *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

However, an exception to the time limit in § 16-5-402 (1), exists if a defendant demonstrates that the failure to seek timely relief was the result of justifiable excuse or excusable neglect. *People v. Green*, 36 P.3d 125 (Colo. App. 2001); *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

But the allegation that there was "justifiable excuse or excusable neglect" without specificity is insufficient and time barred. *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

Because there is no requirement that appellate counsel advise a defendant of time limitations for seeking postconviction relief, the absence of such advice is not a justifiable excuse for defendant's neglect. *People v. Alexander*, 129 P.3d 1051 (Colo. App. 2005).

Postconviction motions that challenge the manner in which a plea is taken, such as whether the person was properly advised about the plea, are not challenges to the legality of the sentence and are properly brought pursuant to section (c), not section (a). *People v. Green*, 36 P.3d 125 (Colo. App. 2001); *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

When a deferred judgment and sentence agreement remains unrevoked, review under this rule is not available as it establishes postconviction remedies, and no conviction has entered. *People ex rel. K.W.S.*, 192 P.3d 579 (Colo. App. 2008).

Defendant who pleads guilty may not bring an as-applied equal protection postconviction challenge. *People v. Ford*, 232 P.3d 260 (Colo. App. 2009).

C. Grounds Justifying Relief.

1. In General.

Previously, this rule specifically limited the trial court's power to grant relief to situations where: (1) The sentence was imposed in violation of the constitution or laws of Colorado or of the United States; or (2) the court imposing the sentence was without jurisdiction to do so; or (3) the sentence was in excess of the maximum sentence authorized by law; or (4) the statute for the violation of which the sentence was imposed was unconstitutional or was repealed before the prisoner contravened its provisions. *Saiz v. People*, 156 Colo. 43, 396 P.2d 963 (1964); *Hammons v. People*, 156 Colo. 484, 400 P.2d 199 (1965).

2. Change of Law.

Subsection (c)(1) appropriate where change intervenes before imposition of sentence. A defendant is given the right to make application for postconviction review when there has been a significant change in the law, applied to defendant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard. Hence, subsection (c)(1) is especially appropriate where a change in the law intervenes before conviction is had and sentence is imposed. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Where amendatory legislation mitigating the penalty for the offense became effective prior to imposition of the sentence, the defendant is entitled as a matter of law to be sentenced thereunder, although probation is imposed before the legislation and revocation with sentencing afterwards. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

Standing to challenge conviction based upon change of law. Section (c) is proper motion for obtaining postconviction relief in circumstance in which one of the statutes under which the defendant was charged was later held unconstitutional, and therefore defendant had standing to bring such a motion. *People v. Crespin*, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

But where court overrules prior fourth amendment holding, suppression issues become moot upon entry of a guilty verdict and relief properly denied. *People v. Waits*, 695 P.2d 1176 (Colo. App. 1984), aff'd in part and rev'd in part on other grounds, 724 P.2d 1329 (Colo. 1986).

Retroactive application of amendments to § 17-2-103 (12), providing that a parole officer shall request that parole revocation proceedings be deferred pending a disposition of a criminal charge, denied under this rule because subsection (c)(1) provides a remedy to

an offender whose conviction or sentence is affected by a change in the law during the pendency of a direct appeal of such conviction or sentence, but not to an offender claiming the benefit of changes in the law that occur during the pendency of other postconviction proceedings. *People v. White*, 804 P.2d 247 (Colo. App. 1990).

3. Constitutionally Infirm Judgment.

Section (c) provides procedural mechanism to attack a conviction which is constitutionally infirm. *People v. Ivery*, 44 Colo. App. 511, 615 P.2d 80 (1980).

Sufficiency of the evidence is a constitutional issue, cognizable under subsection (c)(2). *People v. Nunez*, 673 P.2d 53 (Colo. App. 1983).

Postconviction questions pertaining to constitutionality of judgment of conviction are solely within rule. *Shearer v. Patterson*, 159 Colo. 319, 411 P.2d 247 (1966).

A claim that the trial court aggravated a sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is cognizable under section (c) and not section (a). *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Contention that sentence violates double jeopardy prohibition of the fifth amendment of the U.S. constitution is cognizable under section (c). *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Contention that sentencing scheme set forth in Colorado Sex Offender Lifetime Supervision Act violates equal protection is cognizable under section (c) of this rule. *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Contention that Colorado Sex Offender Lifetime Supervision Act violates due process because it does not provide for a continuing opportunity to be heard and does not give offenders a meaningful chance to demonstrate their rehabilitation is cognizable under section (c) of this rule. *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Contention that trial court used an unreliable test in sentencing defendant in violation of due process is cognizable under section (c) of this rule. *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

If motion specifies violation of constitutional rights, hearing required. If a defendant's motion to vacate, or any attachments thereto, specify matters which are deemed to have violated his constitutional rights, then it would be incumbent upon the trial court to treat this motion in the nature of a section (c) motion and conduct a hearing to determine if there was a violation of any of the constitutional rights of the defendant. *DeBaca v. People*, 170 Colo. 415, 462 P.2d 496 (1969).

Submission of the constitutionally infirm crime of extreme indifference murder under a general verdict to jury was not harmless error beyond a reasonable doubt. *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

4. Unlawful Revocation of Sentence.

Rule provides remedy for revocation of deferred sentence. A defendant may either appeal an order revoking a deferred sentence, pursuant to C.A.R. 1, or file a motion for postconviction review, pursuant to section (c) of this rule. *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

As an order revoking deferred sentence is equivalent of revocation of conditional release for purposes of subsection (c)(2)(VII). *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

Offender is not entitled to relief under section (c) of this rule when record demonstrates that offender was given statutorily required administrative review prior to termination from a community corrections program by the trial court in its role as the referring agency. *People v. Rogers*, 9 P.3d 371 (Colo. 2000).

5. Invalid Guilty Plea.

State courts empowered to determine validity of pleas. Section (c) confers jurisdiction upon the state courts to hear and determine allegations which go to the validity of a petitioner's plea of guilty. *Patterson v. Hampton*, 355 F.2d 470 (10th Cir. 1966).

As such allegations raise no question justiciable in "habeas corpus". Allegations of a petition which go to the validity of petitioner's plea of guilty are properly brought under this rule and raises no question properly justiciable in "habeas corpus". *Stewart v. Tinsley*, 157 Colo. 441, 403 P.2d 220 (1965); *Martinez v. Tinsley*, 158 Colo. 236, 405 P.2d 943 (1965).

Defendant entitled to opportunity to prove allegations of coercion. No matter how improbable allegations of coercion may be, so long as they are not completely incredible, a defendant is entitled to the opportunity of trying to prove them at a hearing. *Von Pickrell v. People*, 163 Colo. 591, 431 P.2d 1003 (1967).

And entitled to withdraw plea made under influence of drugs. If the defendant can show that he was under the influence of tranquilizing drugs at the time he changed his plea to guilty, to the extent that the guilty plea was not a free and voluntary act, he would be entitled to withdraw that plea and go to trial on a plea of not guilty, particularly where he alleges that he has a valid defense to the charges against him. *Von Pickrell v. People*, 163 Colo. 591, 431 P.2d 1003 (1967).

Failure of court to advise or make inquiry precludes treating plea as voluntary. Failure of the trial court to advise or to make a proper inquiry precludes treating the defendant's plea of guilty as a voluntary and intelligent waiver of his constitutional rights, so defendant may withdraw his plea of guilty and be permitted to plea anew. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

And elements of crime charged must be explained in understandable terms. A guilty plea cannot stand as voluntarily and knowingly entered unless the defendant understands the nature of the crime charged, and this requirement is not met unless the critical elements of the crime charged are explained in terms which are understandable to the defendant. *People v. Gorniak*, 197 Colo. 289, 593 P.2d 349 (1979).

But a defendant may plead guilty to a crime which does not exist and for which he could not be convicted at trial, and because the defendant receives a substantial benefit by pleading guilty to the lesser charges, postconviction relief will be denied. *People v. Waits*, 695 P.2d 1176 (Colo. App. 1984), *aff'd in part and rev'd in part* on other grounds, 724 P.2d 1329 (Colo. 1986).

Defendant need not be advised on right to remain silent in competency evaluation for a postconviction motion under section (c) if the evaluation is not being used to establish guilt. No self-incrimination issue exists, and procedural safeguards of § 16-8-117 do not apply because defendant already confessed, pleaded guilty, and was sentenced. *People v. Karpierz*, 165 P.3d 753 (Colo. App. 2006).

The defendant must receive advisement of mandatory parole requirement when entering into a plea agreement so that the defendant has the requisite knowledge of the consequences of the plea agreement. Without sufficient advisement, the plea agreement can be withdrawn. *People v. Seanev*, 36 P.3d 81 (Colo. App. 2000).

Hearing granted where no showing defendant aware of difference between felony and misdemeanor. Where the record fails to show defendant was aware of difference between felony and misdemeanor offenses when pleading guilty, he should be granted a hearing on his petition for postconviction relief. *People v. Rivera*, 185 Colo. 337, 524 P.2d 1082 (1974).

Existence of prejudice resulting from ineffective assistance of counsel is not determined by underlying "truth" of a guilty plea, but rather by whether there is a reasonable probability that defendant would not have pleaded guilty but for counsel's failure to make him aware of the consequences of such plea. *People v. Garcia*, 799 P.2d 413 (Colo. App. 1990).

Defendant who pleaded guilty to first degree sexual assault was resentenced to reflect terms of plea bargain as interpreted by court. Defendant's plea was based on court's

interpretation of plea bargain that, if qualified under "good time law", he would serve no more than one-half of sentence agreed upon, but after defendant entered his plea, parole board determined that parole was discretionary, not mandatory, for sex offenders and that defendant may be required to serve the full sentence on his conviction. *People v. Wilbur*, 873 P.2d 1 (Colo. App. 1993).

Trial court did not cause defendant's plea to be involuntarily made, where neither the People nor the trial court represented that defendant would be released on parole at any particular time, the court specifically stated to defendant that it would not be bound by any representations made to defendant concerning the penalty to be imposed or the granting or denial of probation, and neither the trial court nor the prosecutor referred to the parole board's early release policy. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

Trial court's failure to advise defendant of the possibility of being sentenced pursuant to the Sex Offenders Act, former §§16-13-201 to 16-13-216, was not grounds to set aside defendant's guilty plea entered a decade earlier; the failure to so advise was harmless since the defendant was not originally sentenced under the Act. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it related to the quality of his counsel was properly denied as successive under subsection (c)(3)(VII) of this rule, where lengthy evidentiary hearing was held on defendant's Crim. P. 32(d) motion claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. *People v. Vondra*, 240 P.3d 493 (Colo. App. 2010).

6. Deprivation of Appellate Rights.

Constitutional violation where deprivation of appellate rights by fraud or deception. A deprivation of constitutional rights has been held to exist where factors such as fraud or deception imposed upon a convicted person by his attorney deprive him of his appellate rights. *Haines v. People*, 169 Colo. 136, 454 P.2d 595 (1969).

Otherwise, meritorious grounds for appellate review must be shown. Where a motion for postconviction relief is based on an alleged deprivation of the right to appeal, meritorious grounds for appellate review must be shown. *Haines v. People*, 169 Colo. 136, 454 P.2d 595 (1969).

Indigent defendant is entitled to obtain a free transcript when necessary to exercise the right of appeal. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

So long as furnishing of free transcript not "vain and useless" gesture. To warrant the furnishing of a free transcript, the petitioner must make some showing that the furnishing of such would not be just a "vain and useless" gesture, but that he is entitled to relief under this rule. Valdez v. District Court, 171 Colo. 436, 467 P.2d 825 (1970); Romero v. District Court, 178 Colo. 200, 496 P.2d 1049 (1972).

Inasmuch as such would be the infliction of a needless expense. As to the right to have a free transcript on appeal, where petitioner does not come within the requirements of section (c) and no showing has been made why a very expensive transcript will be of any use to him, then the infliction of the needless expense to prepare such upon a small local unit of government under these circumstances would be an injustice. Peirce v. People, 158 Colo. 81, 404 P.2d 843 (1965).

Allegations of ineffective assistance of counsel in appellate proceedings may be considered by the trial court in connection with motion for postconviction relief. People v. Williams, 736 P.2d 1229 (Colo. App. 1986).

Attorney's performance found to be patently deficient in proceeding under this rule alleging ineffective assistance of counsel where such attorney failed to file a petition for writ of certiorari in a timely fashion after receiving three extensions of time from supreme court. People v. Valdez, 789 P.2d 406 (Colo. 1990).

Motion for postconviction relief under this rule denied where defendant failed to establish that he had suffered prejudice due to patently deficient performance of attorney in handling criminal appeal. People v. Valdez, 789 P.2d 406 (Colo. 1990).

A motion or petition for habeas corpus is a collateral attack that may be dismissed upon the defendant's death, since doing so does not deprive the defendant of the right to appeal the conviction. People v. Valdez, 911 P.2d 703 (Colo. App. 1996).

7. Other Grounds.

Issue involving jurisdiction of court to impose certain sentence is subject to review under section (c). Johnson v. People, 174 Colo. 75, 482 P.2d 105 (1971).

A defendant may not plead guilty to a crime after the general assembly has expressly repealed the statute defining that crime. Defendant's plea to first degree assault pursuant to § 18-3-202 (1)(d), after such section was repealed, was illegal and, because it was material to his plea agreement, his plea agreement was vacated. People v. Wetter, 985 P.2d 79 (Colo. App. 1999).

Due process failure where jury would not have been convicted with later discovered evidence. If with later discovered evidence the

jury would not have convicted the defendant, it can be said that the conviction can be laid at the door of inadequate preparation on the part of both sides, and this has the magnitude of a failure to due process, calling for a new trial. People v. Armstead, 179 Colo. 387, 501 P.2d 472 (1972).

Where prior conviction is decreed a nullity by final judgment of court of appeals. The defendant cannot "reaffirm" the validity of a prior conviction at an habitual offender hearing when the court of appeals has decreed by final judgment that the prior conviction is a nullity. People v. Dugger, 673 P.2d 351 (Colo. 1983).

Invited error doctrine not applicable as basis for denying postconviction relief. Defendant should not be estopped from challenging conviction on grounds that he invited the error by successfully objecting to submission of a special verdict form where court found that although the use of a general verdict form prevented a means of determining whether error raised in postconviction motion was harmless, the use of a general verdict form did not induce error by the trial court. People v. Crespin, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

Ineffective assistance of counsel. Defendant has burden to show inadequate representation, and a conviction will not be set aside unless, based on record as a whole, there was a denial of fundamental fairness. People v. Gies, 738 P.2d 398 (Colo. 1987); People v. Karpierz, 165 P.3d 753 (Colo. App. 2006).

There is no need to inquire into trial errors or prejudice if trial counsel is found to be incompetent as a matter of law. In such case as trial counsel is found to be incompetent as a matter of law, defendant is entitled to new trial for this reason alone. People v. Kenny, 30 P.3d 734 (Colo. App. 2000).

Trial counsel conflict of interest. If the trial court determines that a conflict of interest existed, such conflict adversely affected counsel's conduct, and that defendant did not voluntarily, knowingly, and intelligently waive the right to conflict-free representation, judgment of conviction must be vacated and a new trial should be conducted. People v. Kenny, 30 P.3d 734 (Colo. App. 2000).

Strickland ineffective assistance standard requires that the court evaluate the evidence from the perspective of defense counsel as of the time of the representation in question and to indulge a strong presumption that defense counsel's efforts constituted effective assistance. People v. Naranjo, 840 P.2d 319 (Colo. 1992).

If the court determines defense counsel's performance was not constitutionally deficient, it need not consider the prejudice prong of the ineffective assistance test. People v. Sparks, 914 P.2d 544 (Colo. App. 1996).

Strickland test, while based on the constitutional right to counsel, is applicable to the determination of whether a defendant has received effective assistance of counsel in a postconviction proceeding. *People v. Hickey*, 914 P.2d 377 (Colo. App. 1995).

In order to obtain relief based on a claim of ineffective assistance of counsel, a defendant must affirmatively prove both that his counsel's performance fell below the standard of professional reasonableness and that such performance prejudiced him, i.e., that there is reasonable probability that, but for such deficient performance, the outcome at trial would have been different. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

Ineffective assistance of counsel may arise when an attorney's representation is intrinsically improper because of an actual conflict of interest. However, to make a showing of actual conflict of interest, the defendant must demonstrate a basis for the underlying ineffective assistance of counsel challenges. No basis was found where claim of ineffective assistance of counsel was based on bare allegations of failure to file an appeal with no showing of the existence of grounds for an appeal. *People v. Rhorer*, 946 P.2d 503 (Colo. App. 1997), rev'd on other grounds, 967 P.2d 147 (Colo. 1998).

To succeed on a motion for new trial based on newly discovered evidence, the defendant must show that the evidence was discovered after the trial; that defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; that the newly discovered evidence is material to the issues involved and not merely cumulative or impeaching; and lastly, that the newly discovered evidence is of such character as probably to bring about an acquittal verdict if presented at another trial. *People v. Muniz*, 928 P.2d 1352 (Colo. App. 1996); *People v. Tomey*, 969 P.2d 785 (Colo. App. 1998); *People v. Mason*, 997 P.2d 1245 (Colo. App. 1999), aff'd on other grounds, 25 P.3d 764 (Colo. 2001).

Question in evaluating probability that new evidence would bring about an acquittal is not whether the court, in its experience, would consider a particular witness credible, but rather whether a reasonable jury would probably conclude that there existed a reasonable doubt of guilt based on all evidence, including the new evidence, as developed in the course of trial. *People v. Estep*, 799 P.2d 405 (Colo. 1990).

Defendant entitled to a new trial upon the withdrawal of his guilty plea based upon newly discovered evidence. The defendant must present evidence from which the trial court may reasonably conclude that: (1) The newly discovered evidence was discovered after the entry of the plea, and in the exercise of

reasonable diligence by the defendant and his or her counsel, could not have been discovered earlier; (2) the charges that the People filed against the defendant, or the charges to which the defendant pleaded guilty were actually false or unfounded; and (3) the newly discovered evidence would probably bring about a verdict of acquittal in a trial. *People v. Schneider*, 25 P.3d 755 (Colo. 2001); *Mason v. People*, 25 P.3d 764 (Colo. 2001).

An Alford plea and a guilty plea are the same for purposes of analysis under *Schneider*. *People v. Schneider*, 25 P.3d 755 (Colo. 2001).

A trial court may consider corroborating evidence in assessing a recanting witness's credibility. *People v. Schneider*, 25 P.3d 755 (Colo. 2001).

Trial court record demonstrated defendant was aware that a crime of violence charge would increase his potential sentence and supported trial court's denial of motion to vacate upon finding that defendant's plea was knowingly and voluntarily entered. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

It is extremely unlikely that a reasonable jury would acquit the defendant of drug charges in a new trial at which a witness now states, six years after the original trial, that she placed the drugs in the defendant's wallet. The trial court found it "rather incredible" that the witness would not mention that she had put the drugs in his wallet during the first trial and that the witness did not know that the defendant was in prison until six years later. The witness' testimony was further weakened by the fact that she was no longer subject to prosecution for her conduct and the fact that her testimony conflicted with her affidavit with respect to where she obtained the drugs. *People v. Muniz*, 928 P.2d 1352 (Colo. App. 1996).

A defendant who enters a guilty plea is entitled to file a motion for post-conviction relief based on newly discovered evidence. *People v. Tomey*, 969 P.2d 785 (Colo. App. 1998).

District court exceeded its statutory jurisdiction by ordering that defendant not have custody of her children as a condition of probation, since juvenile courts have exclusive jurisdiction to determine the legal custody of any child who is dependent and neglected under § 19-1-104. *People v. Forsythe*, 43 P.3d 652 (Colo. App. 2001).

D. Grounds Not Justifying Relief.

1. In General.

Mere error, unless of constitutional dimension, is no grounds for postconviction relief. *People v. Crawford*, 183 Colo. 166, 515 P.2d 631 (1973).

Such as failure to follow rule's formal requirements. For collateral relief such as habeas

corpus to be available, more than a failure to follow the formal requirements of a rule of criminal procedure must be shown. *Martinez v. Ricketts*, 498 F. Supp. 893 (D. Colo. 1980).

Trial court's failure to readvise defendant of elements of crime at providency hearing is not fatal to the conviction where record shows that defendant's plea was knowingly and understandingly made. *People v. Reyes*, 713 P.2d 1331 (Colo. App. 1985).

Trial court's alleged error in refusing to permit defendant's wife to testify as to his nonviolent character and prior sexual conduct and allegation that prosecutor's remarks during cross-examination and closing argument were so prejudicial as to constitute reversible error were not proper grounds for postconviction relief. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

Alleged defects in grand jury proceedings do not constitute grounds for relief from conviction, because once a defendant has been found guilty beyond a reasonable doubt, the issue of probable cause found at a grand jury proceeding becomes moot. *People v. Tyler*, 802 P.2d 1153 (Colo. App. 1990).

Trial court's failure to advise defendant of the mandatory parole term did not constitute reversible error. Because the length of the defendant's sentence was less than the maximum that he was advised he could receive, the trial court properly determined that defendant had entered a valid guilty plea. Consequently, it committed no error in denying defendant's motion under this rule. *People v. Tyus*, 776 P.2d 1143 (Colo. App. 1989).

Trial court's failure to advise defendant of mandatory parole term at the time he pleaded guilty to probation violation was not error because court had previously advised defendant when he pleaded guilty to the charge. *People v. Wright*, 53 P.3d 730 (Colo. App. 2002).

Where mittimus does not reference a mandatory period of parole, remand is required for correction of the mittimus rather than granting defendant's Crim. P. 35(c) motion. *People v. Barth*, 981 P.2d 1102 (Colo. App. 1999).

Allowing witness for defendant to appear in jail clothing is not reversible error where defendant cannot show he was prejudiced thereby. *People v. Walters*, 796 P.2d 13 (Colo. App. 1990); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

Trial court's instruction that the jury could consider defendant's voluntary absence from the trial as evidence of guilt was not error. The court had made reasonable inquiry as to the defendant's whereabouts before continuing the trial. *People v. Tafoya*, 833 P.2d 841 (Colo. App. 1992).

Where the only issue raised in a motion under this rule concerns the construction of

statutes, failure of the trial court to make findings of fact and conclusions of law is harmless and does not require reversal. *People v. Young*, 908 P.2d 1147 (Colo. App. 1995).

Defense counsel's failure to inform defendant of mandatory consecutive sentences did not result in ineffective assistance of counsel. The record supported the trial court's conclusion that defendant would not have accepted a plea bargain sentence in excess of 20 years, therefore defense counsel's failure to inform defendant of the mandatory consecutive sentence provision did not result in prejudice. *People v. Williams*, 908 P.2d 1157 (Colo. App. 1995).

Defendant cannot claim ineffective assistance of counsel for failing to perfect appeal while defendant was a fugitive. Counsel's performance could not have prejudiced defendant by forcing forfeiture of an appeal because, by fleeing from justice while his appeal was pending, defendant himself forfeited his right to appellate review. *People v. Brown*, 250 P.3d 679 (Colo. App. 2010).

Application of mandatory parole period did not violate equal protection where person is sentenced differently than others in same felony "class". Defendant is only "similarly situated" with defendants who commit the same or similar acts. *People v. Friesen*, 45 P.3d 784 (Colo. App. 2001); *People v. Walker*, 75 P.3d 722 (Colo. App. 2002).

2. Procedural Errors.

Review on grounds of duplicity in charge is proper only by appeal to the conviction and not by means of this rule. *Specht v. People*, 156 Colo. 12, 396 P.2d 838 (1964).

And mere surplusage in charge does not require court to hold a full-blown hearing into a motion to vacate, where it could be clearly seen from the motion itself that the particular matter was without merit, such being a matter of form not affecting the "real merits" of the offense charged. *Carter v. People*, 161 Colo. 10, 419 P.2d 654 (1966).

Defendant cannot collaterally attack untrue record of arraignment and plea. Where the record as to arraignment and plea is not true, the defendant must reasonably call the defect to the court's attention by a motion for correction of error, but he cannot collaterally attack it. *Madrid v. People*, 148 Colo. 149, 365 P.2d 39 (1961).

Hearing not required by delay where not oppressive or arbitrary. Where the record does not disclose any objection to a delay made by the defendant at the time of trial and the defendant's motion under this rule does not set forth any facts showing that the delay was in any manner oppressive or arbitrary, that he was in any way deprived of any defense, or that any

witness was unavailable, then under such circumstances, the court is not required to hold an evidentiary hearing. *Valdez v. People*, 174 Colo. 268, 483 P.2d 1333 (1971).

Attack on credibility of witnesses for the state is a matter not reviewable by motion under this rule, since it does not raise a constitutional question. *Taylor v. People*, 155 Colo. 15, 392 P.2d 294 (1964).

Nor is admissibility of exhibit based on alleged lack of foundation. The issue as to the admissibility of an exhibit based on an alleged lack of foundation not based on any constitutional ground is not one which can form the basis for relief under section (c). *Walters v. People*, 166 Colo. 90, 441 P.2d 647 (1968).

Tactical error regarding trial strategy insufficient basis for relief. Where counsel makes an informed decision regarding trial strategy and offers several theories of defense, only one of which is challenged as having been ineffectively presented at trial, this tactical error does not provide the necessary basis for post-conviction relief. *People v. Stroup*, 624 P.2d 913 (Colo. App. 1980).

As are, generally, errors in jury instructions. As a general rule, errors in jury instructions do not constitute fundamental error that would provide a basis for collateral attack. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

And failure to appoint counsel on appeal. The failure to appoint counsel to carry an appeal does not authorize, or even permit, the setting aside of a judgment and sentence under this rule. Rather, the proper remedy is another request that he be appointed counsel to examine the trial record. *Cruz v. People*, 157 Colo. 479, 405 P.2d 213 (1965), cert. denied, 383 U.S. 915, 86 S. Ct. 905, 15 L. Ed. 2d 669 (1966).

3. Plea Bargaining and Disparate Sentences.

Allegation of plea bargaining, standing alone, is not sufficient upon which to base a charge of coercion of a guilty plea. *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967).

Due process not denied where judge considers truthfulness of defendant's presentence statements. It is not a denial of due process for a judge, in connection with sentencing procedure, to consider the truthfulness of voluntary statements made by the defendant at a presentence hearing. *People v. Quarles*, 182 Colo. 321, 512 P.2d 1240 (1973).

And relief cannot be given for disparity in sentences. A defendant is not entitled to relief under section (c) based on a lack of equal protection of the law due to the disparity of the sentences between himself and a codefendant. *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972).

Nor where defendant alleges that prison conditions constitute cruel and unusual punishment. The defendant's allegations that conditions at a prison constitute cruel and unusual punishment, making his sentence more onerous than that contemplated by the sentencing judge, do not present a claim for relief under this rule. *People v. Sundstrom*, 638 P.2d 831 (Colo. App. 1981).

Defendant need not be advised on right to remain silent in competency evaluation for a postconviction motion under section (c) if the evaluation is not being used to establish guilt. No self-incrimination issue exists, and procedural safeguards of § 16-8-117 do not apply because defendant already confessed, pleaded guilty, and was sentenced. *People v. Karpierz*, 165 P.3d 753 (Colo. App. 2006).

4. Failure to Take Appeal.

Mere failure to take appeal cannot support collateral attack. The mere failure, or even neglect, to take an appeal, "standing alone", whether excusable or not, raises no constitutional question, and, hence, does not support a collateral attack. *Haines v. People*, 169 Colo. 136, 454 P.2d 595 (1969); *People v. Rhorer*, 946 P.2d 503 (Colo. App. 1997), rev'd on other grounds, 967 P.2d 147 (Colo. 1998).

Unless party precluded from appealing. Where a party has not availed himself of the normal appeal procedure, unless he has been effectively precluded from doing so, he cannot thereafter seize upon this remedy in order to seek relief from alleged grievances which are properly the subject of an appeal. *Taylor v. People*, 155 Colo. 15, 392 P.2d 294 (1964).

Or where true prejudice to petitioner. Where a petitioner's time to sue out an appeal has long since passed and he has effectively and knowingly waived his right to file a motion for a new trial, he cannot, in the absence of any showing of true prejudice which could bring him under this rule, be heard to complain that his waiver had a legal effect he did not then contemplate. *Peirce v. People*, 158 Colo. 81, 404 P.2d 843 (1965).

E. Motion and Hearing.

1. When Hearing Granted.

If allegations set forth proper grounds for relief, court must grant prompt hearing. *Patterson v. Hampton*, 355 F.2d 470 (10th Cir. 1966).

If a motion under section (c) sets forth facts constituting grounds for relief from a sentence, a prompt hearing by the trial court must be granted, unless the motions, files, and records satisfactorily show that the prisoner is not entitled to relief. *Allen v. People*, 157 Colo. 582,

404 P.2d 266 (1965); *Roberts v. People*, 158 Colo. 76, 404 P.2d 848 (1965); *Coleman v. People*, 174 Colo. 94, 482 P.2d 378 (1971).

When defense counsel's ineffective assistance deprives defendant of a hearing on the merits of his or her postconviction claim, the remedy is to provide such a hearing. Thus, vindication of this statutory right trumps society's interest in the finality of convictions. *People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007).

Even when the record clearly demonstrates that postconviction counsel was ineffective in representing defendant through counsel's delay, proof of acquiescence could show defendant abandoned an ineffective assistance of counsel claim or waived the right to effective assistance of counsel. *People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007).

Whether a waiver of effective assistance of counsel was voluntary is a question of fact for the trial court. *People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007).

The allegation that defense counsel failed to inform defendant of his or her right to appeal plus the fact that the court did not advise the defendant of his or her right to appeal is sufficient to warrant an evidentiary hearing. *People v. Boespflug*, 107 P.3d 1118 (Colo. App. 2004).

Evidentiary hearing not required where only legal issues to be decided by judge. An evidentiary hearing is not required under this rule where the motion, files, and record present only issues of law, or where the motion itself fails to specify the facts supporting the constitutional claim. *People v. Trujillo*, 190 Colo. 497, 549 P.2d 1312 (1976); *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

Hearing unnecessary, and motion dismissed, where record shows no entitlement to relief. A motion under this rule may be dismissed without a hearing in the case where the motion, the files, and the record show to the satisfaction of the court that the prisoner is not entitled to relief. *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

This rule permits a trial judge to deny the motion without granting a hearing, but only in those cases where the motion, the files, and the record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief. *People v. Hutton*, 183 Colo. 388, 517 P.2d 392 (1973); *People v. Breaman*, 924 P.2d 1139 (Colo. App. 1996).

Where the motion and the record of the case show, to the satisfaction of the court, that the prisoner is not entitled to relief, a hearing is not necessary. *People v. Velarde*, 200 Colo. 374, 616 P.2d 104 (1980).

A motion under section (c) may be dismissed without a hearing if the motion, the files, and the record clearly establish that the defendant is

not entitled to relief. *People v. Hartkemeyer*, 843 P.2d 92 (Colo. App. 1992); *People v. Ruiz*, 935 P.2d 68 (Colo. App. 1996); *People v. Mayes*, 981 P.2d 1106 (Colo. App. 1999); *People v. Moriarity*, 8 P.3d 566 (Colo. App. 2000); *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001); *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002); *People v. Vieyra*, 169 P.3d 205 (Colo. App. 2007).

Trial court did not err in failing to grant defendant a hearing where the court referred only to information in the motion, record, and files in denying defendant's motion. *People v. Fernandez*, 53 P.3d 773 (Colo. App. 2002).

Although the court may, after considering the motion and supporting documents, deny a motion pursuant to Crim. P. 35 without a hearing, the court may not grant the motion without a hearing. *People v. Davis*, 849 P.2d 857 (Colo. App. 1992), *aff'd*, 871 P.2d 769 (Colo. 1994).

Court of appeals erred in vacating respondent's guilty plea based upon allegations contained in his or her section (c) motion. However, since the allegations, if true, may entitle respondent to relief, the district court must conduct an evidentiary hearing to ascertain the veracity of respondent's claims. *People v. Simpson*, 69 P.3d 79 (Colo. 2003).

Before accepting a defendant's guilty plea, a trial court must adequately advise the defendant regarding a mandatory parole period. Appropriate remedy is to remand for a hearing to determine if defendant was aware of a mandatory parole term and, if not, whether he nevertheless would have pled guilty. *People v. Calderon*, 992 P.2d 1201 (Colo. App. 1999).

2. Sufficiency of Allegations.

Bald allegation of constitutional error is sufficient for review when specific facts are not pleaded to support the claim. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Bare allegations of incompetence or coercion are not sufficient to entitle a defendant to an evidentiary hearing in section (c) proceeding. *Von Pickrell v. People*, 163 Colo. 591, 431 P.2d 1003 (1967); *Bradley v. People*, 175 Colo. 146, 485 P.2d 875 (1971).

Bare allegations of incompetency of counsel are not sufficient to entitle a defendant to an evidentiary hearing in a proceeding under section (c). *Moore v. People*, 174 Colo. 570, 485 P.2d 114 (1971); *People v. Osorio*, 170 P.3d 796 (Colo. App. 2007).

Bare assertions of mental exhaustion on the part of the defendant because of a series of continuances resulting in less than a month's delay is not equivalent to mental incompetence.

Bradley v. People, 175 Colo. 146, 485 P.2d 875 (1971).

And evidentiary hearings will not be granted on vague conclusional charges. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

As where motion alleges sentence is "illegal" in violation of fourth and fifth amendments. It is impossible to glean from a motion any clear indication of how petitioner's constitutional rights may have been violated in connection with his conviction and sentence in the trial court where the motion does no more than allege that the sentence of the trial court was "illegal" and should be vacated because it was imposed in "violation of the fourth and fifth amendments", as such a motion contains no exposition of any facts from which a trial court could detect any basis for unconstitutional action or inaction. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

Specific facts to support the claim must appear in petition for postconviction relief. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

A defendant need only assert facts that, if true, would provide a basis for relief to warrant a hearing. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Petitioner must allege ultimate facts with particularity. The petitioner has the burden to allege with particularity ultimate facts which support a conclusion that a judicial proceeding is illegal or irregular. Melton v. People, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966).

Motion for section (c) review is insufficient where it does not specify facts which constitute the basis for the unconstitutional charge. DeBaca v. People, 170 Colo. 415, 462 P.2d 496 (1969).

Motion that fails to contain sufficient allegations to support the claim asserted as the basis for relief may be dismissed for failure to state a claim upon which relief may be granted. People v. Bossert, 772 P.2d 618 (Colo. 1989).

And, failing specific facts, no hearing. Failing specific facts to support a claim, no issue is raised which demands an evidentiary hearing. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

If the motion contains no allegations of facts upon which relief can be granted, there is no requirement that an evidentiary hearing be had or that an attorney be appointed to represent the defendant. Kostal v. People, 167 Colo. 317, 447 P.2d 536 (1968); People v. Lyons, 196 Colo. 384, 585 P.2d 916 (1978).

And motion, and relief, denied. In a proceeding to compel the trial court to grant the defendant a free transcript of all proceedings

had in connection with his criminal conviction, such may be refused where the defendant fails to allege sufficient facts which would warrant the granting of the transcript or which would warrant the granting of relief under section (c). Valdez v. District Court, 171 Colo. 436, 467 P.2d 825 (1970).

A motion for review in the trial court as contemplated by the provisions of this rule is insufficient and may be summarily denied where it does not specify the facts which constitute the basis for the unconstitutional charge. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970); People v. Rodriguez, 914 P.2d 230 (Colo. 1996).

However, that prisoner's factual allegations seem unbelievable or improbable is not the test set forth in this rule for determining whether a hearing should or should not be afforded the prisoner; unless the motion itself, the files, or the record of the case show that the prisoner is not entitled to relief, he must be given an opportunity to support his allegations with evidence presented at a hearing. Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965).

Court of appeals erred in vacating respondent's guilty plea based upon allegations contained in his or her section (c) motion. However, since the allegations, if true, may entitle respondent to relief, the district court must conduct an evidentiary hearing to ascertain the veracity of respondent's claims. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Court may dismiss a motion without a hearing if the motion, the files, and the record clearly establish the right to relief. People v. Simons, 826 P.2d 382 (Colo. App. 1991).

Defendant must allege with particularity in the motion that a present need exists for the relief sought such as the applicant may be disadvantaged in obtaining parole under a later sentence. People v. Santisteven, 868 P.2d 415 (Colo. App. 1993).

Denial of free transcript not an abuse of discretion. Court did not abuse its discretion when it denied a request for free use of a transcript when an indigent defendant failed to demonstrate that he may be entitled to relief under section (c) and that the transcript might contain facts that substantiate his claim. Jurgeovich v. District Ct., 907 P.2d 565 (Colo. 1995).

3. Contemporaneous Objection and Waiver.

Like habeas corpus, proceeding under this rule governed by equitable principles. This rule affords a convicted person the remedies which are available through a writ of habeas corpus, and like the federal habeas corpus proceeding, a proceeding under this rule is governed by equitable principles. People v. Trujillo,

190 Colo. 497, 549 P.2d 1312 (1976); *People v. Bravo*, 692 P.2d 325 (Colo. App. 1984).

Relief denied where right to counsel waived at trial. A trial court properly denies postconviction relief when the defendant knowingly waived his right to be represented by counsel at trial. *Martinez v. People*, 166 Colo. 132, 442 P.2d 422, cert. denied, 393 U.S. 990, 89 S. Ct. 474, 21 L. Ed. 2d 453 (1968).

Rule is not designed to eliminate the requirement for contemporaneous objection and certain rights not raised at trial will be considered waived. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

Failure to raise search and seizure issue at trial tantamount to waiver. The contemporaneous objection rule applies to search and seizure issues, and the failure to raise the objection of an illegal search and seizure by proper objection at the trial level is tantamount to a waiver, in which case a trial court properly denies a motion for relief under section (c) based thereon. *Brown v. People*, 162 Colo. 406, 426 P.2d 764 (1967).

As is failure to raise identification issue. Where there never was an issue raised in the trial as to the identification of defendant, this is a contrived issue, and a trial court is correct in refusing an evidentiary hearing based on petitioner's objection to lineup procedures. *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

And failure to allege lack of speedy trial in motion to dismiss. Where the defendant claims that he pleaded guilty because he was promised that after he had entered his plea the trial court would consider a motion to dismiss for lack of a speedy trial, but makes no such allegation in his motion to dismiss, and there is nothing in the record which could even lead to the inference that such a promise might have been made, the court will not consider the argument. *Wixson v. People*, 175 Colo. 348, 487 P.2d 809 (1971).

One who pleads guilty cannot claim search and seizure illegal. One who pleads guilty is not in a position to successfully move for vacation of judgment on claims of an alleged illegal search and seizure. *Von Pickrell v. People*, 163 Colo. 591, 431 P.2d 1003 (1967).

No issue exists as to legality of plea bargain where sentence given vacated. Where the defendant first admitted his guilt upon being promised a minimum sentence prior to his first sentencing, but, upon being given more than that amount of time, his first sentence is vacated, the issue of the legality of his first plea bargain no longer exists in a subsequent motion. *James v. People*, 162 Colo. 577, 427 P.2d 878 (1967).

4. Burden of Proof.

Legality of prior judgment and proceedings presumed. When attacking a conviction

and sentence by a motion under this rule, the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. *Melton v. People*, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966); *Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971).

When a defendant attacks a conviction and sentence by a motion under section (c), the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. *People v. Brewer*, 648 P.2d 167 (Colo. App. 1982).

Burden of proof of allegations in a section (c) motion rests with petitioner. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971); *Bresnahan v. Patterson*, 352 F. Supp. 1180 (D. Colo. 1973); *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973); *Kailey v. Colo. Dept. of Corr.*, 807 P.2d 563 (Colo. 1991); *People v. Fleming*, 867 P.2d 119 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 19 (Colo. 1995); *People v. Sickich*, 935 P.2d 70 (Colo. App. 1996).

Pleas of guilty induced by threats or promises are not valid, but upon postconviction procedures to set aside such a plea, it becomes the burden of the petitioner to establish that the plea was entered because of coercion. *Normand v. People*, 165 Colo. 509, 440 P.2d 282 (1968).

The burden is on the defendant section (c) hearing to show that his plea was entered because of coercion. *People v. Brewer*, 648 P.2d 167 (Colo. App. 1982).

And measure of proof on motion is ordinarily proof by preponderance of evidence. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971); *People v. Malouff*, 721 P.2d 159 (Colo. App. 1986).

The burden is upon the defendant to establish by at least the preponderance of the evidence the allegations of his section (c) motion. *Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971); *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973).

In a Crim. P. 35(c) proceeding, the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. The burden is upon the movant to establish by a preponderance of the evidence the allegations of the motion for post-conviction relief. If the evidence supports the district court's findings and order, the decision will not be disturbed on review. *People v. Hendricks*, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

District court properly required that petitioner who improperly filed habeas corpus petition establish entitlement to relief under this rule by a preponderance of evidence since the motion should have been treated by the court as a motion under subsection (c)(2) of this rule.

Kailey v. Colo. Dept. of Corr., 807 P.2d 563 (Colo. 1991).

State is under no duty to present any evidence if it believes that petitioner has failed to meet that burden. *Bresnahan v. Patterson*, 352 F. Supp. 1180 (D. Colo. 1973).

Court need not grant defendant's motion because it denies state's motion for dismissal at the conclusion of the defendant's evidence. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

As denial afforded no effect on whether defendant meets burden. A state motion to dismiss and its denial can be afforded no effect as to whether the defendant meets his burden under this rule. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

5. Evidence Examined.

Section (c) hearing criminal, not civil. A section (c) hearing is but one phase of a criminal proceeding, and it is not a civil proceeding. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

Trial judge may utilize the complete trial record insofar as possible and pertinent when he rules on a section (c) motion. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

And judge should identify all documents before him at time of trial. The trial judge should identify for the purposes of the record in the section (c) hearing all documents, letters, and reports which were before him as of the time he permitted the defendant to plead at trial, such identification should be made without regard to the ultimate admissibility of the particular document at the section (c) hearing, and the documents thus identified should then be furnished to counsel for petitioners for the purpose of inspection, copying, and use by counsel in the section (c) hearing as applicable rules permit. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

However, rule's purpose cannot be disposed of by reference to trial record alone. The purpose of a section (c) hearing is to take evidence pertinent to the allegations, which cannot be disposed of by reference to the trial record alone. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

And absence of transcript of prior hearing not necessarily equivalent to silent record. The absence of a transcript of a prior providency hearing is not necessarily equivalent to a silent record at the postconviction review hearing, and whether a knowing and voluntary guilty plea was entered by the defendant may be determined by any evidence adduced at his section (c) hearing. *People v. Brewer*, 648 P.2d 167 (Colo. App. 1982).

Taking of depositions governed by criminal rules and statutory provision. The taking

of any deposition to be used in a section (c) hearing is governed by the rules on criminal procedure and the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, contained in § 16-9-201 et seq. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

And so subpoenas may be served on out-of-state residents to compel attendance. That the Rules of Civil Procedure do not govern the taking of depositions in connection with a section (c) hearing is without prejudice to the right of a petitioner to serve subpoenas in accordance with the Rules of Criminal Procedure and § 16-9-201 et seq. on out-of-state residents and thereby compel their attendance at a section (c) hearing. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

Defendant's attorney for prior hearing and sentencing may testify in postconviction relief hearing. Regarding the voluntariness of a guilty plea, the defendant's knowledge of the elements of the crime may be developed in a postconviction relief hearing, and the defendant's attorney for the prior hearing and sentencing may testify in the postconviction relief hearing that the defendant knew and understood all the elements of the crime charged. *People v. Keenan*, 185 Colo. 317, 524 P.2d 604 (1974).

6. Role of Petitioner and Judge.

Petitioner's presence generally necessary. If an evidentiary hearing under section (c) is required, then the petitioner's presence would be necessary under most circumstances. *Hooker v. People*, 173 Colo. 226, 477 P.2d 376 (1970).

And assistance of counsel essential, unless claim wholly unfounded. An accused has a right to counsel at every stage of the proceeding, and, in the absence of a knowing and intelligent waiver, the assistance of counsel is essential in postconviction proceedings, unless the asserted claim for relief is wholly unfounded. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Where no hearing is necessary, no error is committed where petitioner is absent. *Hooker v. People*, 173 Colo. 226, 477 P.2d 376 (1970).

Or where case is submitted on agreed statements of facts. Applications for postconviction relief can appropriately be decided on the merits without a plenary evidentiary hearing and without the expense, risk, and inconvenience of transporting the applicants, if in custody, from the prison to the courthouse; such a summary disposition is proper in all cases where there is no factual issue and where the case is submitted on an agreed statement of facts. *Dabbs v. People*, 175 Colo. 273, 486 P.2d 1053 (1971).

Rule contemplates hearing wherever possible before trial judge who presided over the

case. A disqualification because he is familiar with what occurred at the trial renders the rule anomalous; familiarity with the circumstances surrounding the trial does not render the judge a material witness. *Bresnahan v. Luby*, 160 Colo. 455, 418 P.2d 171 (1966).

Trial court erred in not holding a hearing on defendant's motions and instead directing defense counsel to conduct an investigation of pertinent allegations and accepting counsel's conclusion that they lacked merit. Such procedure was inappropriate first because defense counsel should not be placed in a position of warranting the validity of his client's assertions, and second because a court in passing upon the validity of a party's assertions must reach its own independent evaluation of such assertions. *People v. Breaman*, 924 P.2d 1139 (Colo. App. 1996).

Weight and credibility given evidence within court's province. The weight and credibility to be given to the testimony of witnesses in a section (c) hearing is within the province of the trial court. *Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971).

Where the trial court found polygraph evidence to be of little weight, it was fully entitled to make such finding as the trier of facts on a motion for postconviction relief. *People v. Armstead*, 179 Colo. 387, 501 P.2d 472 (1972).

Under this rule, the trial court determines all issues of fact and law. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

And makes findings and conclusions. In a section (c) hearing the trial court is bound to determine the issues and make findings of fact and conclusions of law. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

Question of whether defendant's burden of proof is met is answered by findings made by the trial judge. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

Page-long comments, analysis, and conclusions by the trial judge are sufficient to establish that the requirement of this rule, that findings and conclusions must be made, was met. *People v. Crater*, 182 Colo. 248, 512 P.2d 623 (1973).

Judge's findings are based upon trial record and evidence taken as postconviction hearing. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

Findings and conclusions required under rule must sufficiently set forth basis of ruling. *People v. Crater*, 182 Colo. 248, 512 P.2d 623 (1973); *People v. Breaman*, 924 P.2d 1139 (Colo. App. 1996).

Unconstitutional to place undue emphasis on findings not supported by record. A denial of due process under this rule will exist when the trial court places undue emphasis on findings not supported by the record, and the denial is compounded when the trial court arbitrarily

refuses to permit defense counsel to point out to the court the fact that matters not in evidence are being considered. *Noland v. People*, 175 Colo. 6, 485 P.2d 112 (1971).

Trial court lacked jurisdiction to entertain motion to reconsider order denying motion under section (b) of this rule filed more than 120 days after the date of sentencing. *People v. Gresl*, 89 P.3d 499 (Colo. App. 2003).

F. Determination.

1. Relief Granted.

Resentencing where long-time intervals and defendant's status changes from juvenile to adult. Long-time intervals between the arrest and the making of the charge, between the arrest and the arraignment, and between the arrest and time of the appointment of an attorney to represent a defendant require a reversal and a remand of a case to the trial court for the purpose of vacating its prior sentence and resentencing a defendant when defendant's sentence was adversely affected by a change in status from juvenile to adult. *England v. People*, 175 Colo. 236, 486 P.2d 1055 (1971).

New trial required where defendant's trial attorneys fail to present any favorable evidence. Where the defendant fails to receive a fair trial because of the failure of his trial attorneys to present any of the evidence favorable to the defendant which was clearly available and discoverable by even rudimentary investigation, and as a result the damaging prosecution's version of the incident is allowed to remain uncontradicted and unimpeached, even though there was evidence to challenge it, the defendant was denied his constitutional right to a fair trial, which requires that the defendant's conviction be vacated and that he be afforded a new trial. *People v. Moya*, 180 Colo. 228, 504 P.2d 352 (1972).

Inquiry into question of effectiveness of counsel. Where guilty plea subjected defendant to deportation proceedings, inquiry must begin with initial determination that defense counsel in criminal case was aware that his client was an alien, and therefore was reasonably required to research relevant immigration law. *People v. Pozo*, 746 P.2d 523 (Colo. 1987).

Guilty plea vacated where no explanation of elements of charge given defendant. Where the record of the hearing held under section (c) is devoid of any evidence that the defendant understood the nature of the charge, and the only explanation of the charge to the defendant was in the wording of the information, which the court did not even read to him, and the court admits on the record that no explanation was given defendant of the elements of the charge, and there is no other indication that he received the requisite knowledge from other sources, his

plea of guilty was improperly accepted and had to be vacated. *People v. Brown*, 187 Colo. 244, 529 P.2d 1338 (1974).

And where plea results in sentence far in excess to that promised. Where a guilty plea results in a sentence far in excess of that which was promised by the district attorney, the prisoner is entitled to have the sentence vacated and to go to trial on a plea of not guilty when he alleges that he has a valid defense to the charge. *Roberts v. People*, 158 Colo. 76, 404 P.2d 848 (1965).

And violation not remedied by resentencing defendant to same term for lesser offense. Resentencing a defendant years later to substantially the same term for a lesser offense does not remedy the violation of the defendant's right to withdraw his guilty plea or have a determination at the time of the trial whether or not he was guilty "as charged" for a greater offense. *Burman v. People*, 172 Colo. 247, 472 P.2d 121 (1970).

Amended sentence invalid where defendant and attorney not notified and not present. An amended sentence handed down by the trial court is invalid where neither the defendant nor his attorney are notified of resentencing, neither is present, and the substantial rights of defendant are violated by these omissions. *People v. Emig*, 177 Colo. 174, 493 P.2d 368 (1972).

Where jury not qualified to fix death penalty, entry of life-imprisonment sentence authorized. In a first-degree case, where the United States supreme court affirms the guilty verdict and invalidates the punishment portion of the verdict only because the jury was not constitutionally qualified to fix the death penalty, leaving the sole statutory alternative as to punishment available to the jury that of life imprisonment, the entry by the court of such a judgment is a mere ministerial act within the power and authority of the trial judge under the terms and within the contemplation of section (c). *Segura v. District Court*, 179 Colo. 20, 498 P.2d 926 (1972).

Defendant cannot serve a county jail sentence while incarcerated in the penitentiary, and, conversely, he cannot serve a penitentiary sentence in the county jail. *People v. Emig*, 177 Colo. 174, 493 P.2d 368 (1972).

Defendant cannot serve a misdemeanor sentence consecutively to a felony sentence while being held by corrections department. *People v. Green*, 734 P.2d 616 (Colo. 1987); *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

2. Relief Denied.

Where confession's admission harmless error, defendant not prejudiced. Even assuming that a confession was involuntarily made, where

its admission is harmless error, there is no prejudice to any substantive right of the petitioner. *Melton v. People*, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966).

Assistance of counsel effective where no evidence full consideration not given case. The effective assistance of counsel is not denied the defendant where there is no evidence to support the assertion that counsel did not keep defendant informed or that anything but full consideration was given to his case. *People v. Crater*, 182 Colo. 248, 512 P.2d 623 (1973).

And constitutional for attorney not retained to give postconviction testimony. Postconviction testimony of an attorney contacted, but not retained, on behalf of the defendant discloses no violation of defendant's constitutional right to counsel. *LaBlanc v. People*, 177 Colo. 250, 493 P.2d 1089 (1972).

Petitioner found not entitled to relief for denial of effective assistance of counsel. *People v. Stephenson*, 187 Colo. 120, 528 P.2d 1313 (1974).

District court made detailed and extensive findings in determining that, while defense counsel's performance fell below the range of competency expected from him in certain areas, such deficiencies did not result in prejudice to defendant. Therefore, trial court did not err in denying defendant's Crim. P. 35(c) motion. *People v. Hendricks*, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

Even if counsel had presented certain witness's testimony and other evidence of the events surrounding the giving of defendant's statements in a successful effort to suppress them, in light of overwhelming independent evidence that defendant committed this offense, there was no reasonable probability that the outcome of the trial would have been different. Similarly, trial court did not err in determining that trial counsel's performance was not deficient in deciding not to raise the issue of defendant's competency. *People v. Hendricks*, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

Voluntary guilty plea not set aside. A plea of guilty should not be set aside if a factual basis exists for the plea and if the defendant has knowledge of the elements of the crime and enters the plea voluntarily. *People v. Hutton*, 183 Colo. 388, 517 P.2d 392 (1973).

And plea voluntary where considered, deliberate, advised choice. Where the record indicates a considered, deliberate, advised choice on the part of the defendant to change his plea from not guilty to guilty, the trial court's finding that the guilty plea is voluntary and not coerced is amply supported by the record of the proceedings at the time of the entry of the plea, it not being shown to be otherwise by any evi-

dence presented at the hearing on a section (c) motion. *Workman v. People*, 174 Colo. 194, 483 P.2d 213 (1971).

And where defendant represented by able counsel and understands elements of charge. Where at all relevant times the defendant was represented by able counsel and neither in his motion to vacate the guilty plea, nor in the hearing thereon conducted under this rule, was there any indication that he did not understand the elements of the charge, the substance of the circumstances surrounding the plea indicates that it was voluntarily made with an understanding of the elements of the charge. *People v. Edwards*, 186 Colo. 129, 526 P.2d 144 (1974).

Guilty plea upheld where trial judge makes careful and thorough inquiry of defendant. Where the trial court fully complied with the requirements of Crim. P. 11, before granting a defendant's request to withdraw his previous plea and to enter a guilty plea, but the defendant alleges in his Crim. P. 35(c) motion that his plea of guilty was entered because of fear and duress, the plea will be upheld when the record reflects that the trial judge did with care and thoroughness make inquiry of the defendant in order to assure himself that the defendant's act of pleading guilty was his free and voluntary act. *Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971).

Where the record on its face shows that the trial court in a providency hearing advised the petitioner of the possible sentence term, the sentence imposed was within that range, and the trial court did not treat the offense as a second offense, an evidentiary hearing on the petitioner's contention that the sentencing court failed to properly inform him of the possible penalties for crimes to which he entered a guilty plea is not required and the motion for relief will be denied. *Hyde v. Hinton*, 180 Colo. 324, 505 P.2d 376 (1973).

The failure to advise a defendant of the provisions of mandatory parole after the defendant has entered into a plea agreement and the stipulated sentence and mandatory parole period is less than the maximum sentence the court could have imposed upon the defendant is harmless error, thus the court affirmed the trial court's order summarily denying the defendant's motion under this rule. *People v. Munoz*, 9 P.3d 1201 (Colo. App. 2000).

Failure to convey a plea offer is deficient performance by defense counsel and a violation of the standard practice that a defense attorney should follow, but the failure did not constitute prejudice against defendant requiring reversal because the record did not show reasonable probability that the defendant would have accepted the offer if it had been timely communicated. *People v. Perry*, 68 P.3d 472 (Colo. App. 2002).

No credit for presentence jail time where time taken into consideration in sentencing. Where the defendant is sentenced by the judge after the judge is advised of the time that the defendant has spent in jail before the sentence is imposed, where the defendant is advised by the judge at the time sentence is imposed that the time he spent in custody was taken into consideration in determining his sentence, and where the sentence imposed, plus the time spent in custody, is far less than the maximum penalty prescribed by law, the defendant is not entitled to credit for presentence jail time through a postconviction proceeding. *People v. Puls*, 176 Colo. 71, 489 P.2d 323 (1971).

Failure to provide transcript on appeal found not to prejudice defendant. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

The equitable doctrine of laches may be invoked to bar postconviction relief. *People v. Bravo*, 692 P.2d 325 (Colo. App. 1984).

Defendant pleading guilty was sufficiently informed of mens rea element of the offense of rape by information read to him that contained the term "feloniously" and, therefore, postconviction relief was properly denied. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

Present need standard for postconviction relief not established under collateral attack statute for 30-year-old conviction for violations of municipal ordinances. *City and County of Denver v. Rhinehart*, 742 P.2d 948 (Colo. App. 1987).

The trial court was correct in denying defendant's motion under this rule since defendant, who was extradited to Colorado for trial on two charges, was not entitled to credit in second sentence for time spent in confinement prior to imposition of first sentence, if the first sentence had allowed presentence confinement credit for that period of time. *People v. Garcia*, 757 P.2d 1110 (Colo. App. 1988).

Court correctly denied Crim. P. 35(c) motion and held that no conflict of interest existed to defeat defendant's right to counsel. Public defender represented both the defendant and another person against whom the authorities had no evidence, but whom the defendant had admitted to be a co-participant in the burglary. The court stated that the defendant could not seek to profit from the collapse of a self-created situation. *People v. Wood*, 844 P.2d 1299 (Colo. App. 1992).

Defendant may not seek review of felony conviction under section (c) because, under the plea agreement, judgment and sentencing did not enter but were deferred. *People v. Kazadi*, __ P.3d __ (Colo. App. 2011).

When a criminal defendant, who pled guilty to charge, dies while his appeal for relief from his sentence is pending, an abatement of the underlying conviction is not war-

ranted. *People v. Rickstrew*, 961 P.2d 1139 (Colo. App. 1998).

A witness's exercise of the privilege against self-incrimination does not give rise to a violation of the defendant's right to a fair trial or to present a defense. *People v. Coit*, 50 P.3d 936 (Colo. App. 2002).

Because the United States supreme court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), established a procedural, not a substantive, rule and it was not a "watershed" rule, *Crawford* does not apply retroactively to cases on collateral review where the defendant's conviction became final prior to *Crawford*. Under prior case law, out-of-court statements properly admitted. *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004), *aff'd*, 129 P.3d 977 (Colo. 2006).

G. Successive Motions.

Repetitive postconviction proceedings with some legal and factual claims not afforded by constitution. Although postconviction relief is grounded upon constitutional principles, it does not afford any person the right to clog the judicial machinery with repetitive postconviction proceedings seeking relief on the same principles of law and the same factual claims. *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972).

Defendant is unauthorized to file successive motions based upon same or similar allegations in the hope that a sympathetic judicial ear may eventually be found. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Especially where defendant fails to seek review of denial of first similar claim. Where the defendant fails to avail himself of the right to have review of the propriety of the trial court's denial of his motion and thereafter files a second motion to vacate in which he reurges the same grounds raised in the first motion, the trial court under section (c), need not entertain such second and successive motion. *Henson v. People*, 163 Colo. 302, 430 P.2d 475 (1967).

The court is not required to entertain successive motions for similar postconviction relief on behalf of the same prisoner. *Graham v. Zavaras*, 877 P.2d 363 (Colo. 1994); *People v. Harmon*, 3 P.3d 480 (Colo. App. 2000).

Standards on successive motions for review. In the case of a successive motion for postconviction review, the appropriate consideration is whether the defendant's constitutional claim has been fully and finally litigated in the prior postconviction proceeding. *People v. Billips*, 652 P.2d 1060 (Colo. 1982).

The doctrine of *res judicata* is not an appropriate standard for the resolution of postconviction claims. *People v. Billips*, 652 P.2d 1060 (Colo. 1982).

Collateral estoppel inapplicable. Although the doctrine of estoppel is as applicable to criminal proceedings as it is to civil proceedings, it is inapplicable in a section (c) proceeding. *People v. Wright*, 662 P.2d 489 (Colo. App. 1982).

All allegations relating to constitutional violations should be included in single motion. In light of the right to counsel in postconviction proceedings, all allegations relating to the violation of a defendant's constitutional rights should be included in a single section (c) motion. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

All allegations relating to the violation of defendant's constitutional rights should be included in a single section (c) motion. *People v. Bucci*, 184 Colo. 367, 520 P.2d 580 (1974).

And failure to do so results in summary denial of second similar application. The failure of an application to contain all factual and legal contentions will, unless special circumstances exist, ordinarily result in a second application containing such grounds being summarily denied. *People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974).

And prisoner deliberately withholding ground for postconviction relief waives right to second hearing. If a prisoner deliberately withholds one of two grounds for postconviction relief at the time of filing his first application, he may be deemed to have waived his right to a hearing on the second ground in subsequent application. This interpretation is not intended to eliminate any judicial determination on the merits of a prisoner's claims, but rather is to ensure that all claims are considered in one proceeding. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Second motion dismissed unless failure to include newly-asserted grounds in first motion excusable. If a second or successive motion is filed, it may be summarily dismissed without a hearing unless the trial judge finds that the failure to include newly-asserted grounds for relief in the first motion is excusable. *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974).

Such as where defendant urges incompetency of counsel representing him in first hearing. Ordinarily, a defendant would be expected to raise the matter of competency of counsel in a section (c) proceeding, but where his trial counsel is still representing him, and this same counsel prepares the motion of a new trial which does not mention the subject and a new counsel then comes into the case, then under these particular circumstances, if the defendant wishes to urge the point of incompetency of his initial counsel, he may attempt to raise the point in a further section (c) proceeding in the trial court. *Stone v. People*, 174 Colo. 504, 485 P.2d 495 (1971).

Such as where the factual and legal allegations raised in the second motion have not previously been fully and finally decided. *People v. Wimer*, 681 P.2d 967 (Colo. App. 1983).

In the absence of special circumstances, courts need not consider successive requests for the same relief based on the same or similar allegations on behalf of the same prisoner. *People v. Holmes*, 819 P.2d 541 (Colo. App. 1991).

Because defendant did not know of the changed double jeopardy standard when the defendant filed his first motion under section (c), the provisions of subsection (c)(1) mandate that the defendant's application for relief is not barred under the provisions of subsection (c)(3). *People v. Allen*, 843 P.2d 97 (Colo. App. 1992).

Defendant's actions in specifically withdrawing those claims from the trial court's consideration at an earlier proceeding which he argues should have been addressed in the second proceeding, constitute an abandonment of those claims. *People v. Abeyta*, 923 P.2d 318 (Colo. App. 1996).

Defendant's section (c) motion raising cognizable constitutional claims is not successive merely because he had unsuccessfully attempted to raise those claims in his prior appeal. *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it related to the quality of his counsel was properly denied as successive under subsection (c)(3)(VII) of this rule, where lengthy evidentiary hearing was held on defendant's Crim. P. 32(d) motion claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. *People v. Vondra*, 240 P.3d 493 (Colo. App. 2010).

Missouri v. Seibert, 542 U.S. 600 (2004), not a "watershed rule of criminal procedure". Therefore it is not applied retroactively to defendant's conviction that was final prior to its announcement. Court properly denied hearing on defendant's section (c) motion because it did not meet the exception in subsection (c)(3)(VI)(b). *People v. McDowell*, 219 P.3d 332 (Colo. App. 2009).

H. Review on Appeal.

Appellate review of decisions made under this rule may be made. *Henry v. Tinsley*, 344 F.2d 109 (10th Cir. 1965); *Ruark v. Tinsley*, 350 F.2d 315 (10th Cir. 1965).

Including review of order denying relief. Previously, it was not clear whether an order denying relief sought under this rule was appealable. Nevertheless, denial of such relief can now be appealed. *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963).

An order of a trial court denying a motion to vacate is a final order reviewable on appeal. *Henson v. People*, 163 Colo. 302, 430 P.2d 475 (1967).

Question raised for first time in postconviction motion properly before appellate court. A question presented on appeal which was raised for the first time in a postconviction motion and has not been previously considered or disposed of on appeal is properly before an appellate court. *Trujillo v. People*, 178 Colo. 136, 496 P.2d 1026 (1972).

Including matters not raised in new trial motion. While it is true that on appeal an appellate court will not consider a matter not raised in a new trial motion, this constraint does not apply to a section (c) motion. *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

But matters not contained in motion cannot be considered on appeal. The ground that certain exhibits were erroneously received upon trial because of an alleged lack of foundation, not having been contained in the section (c) motion filed in the trial court, cannot be raised for the first time on appeal. *Walters v. People*, 166 Colo. 90, 441 P.2d 647 (1968).

Issue not raised in motion or hearing not reviewable. An issue not raised in either section (c) motion or at the trial court hearing is not properly before the appellate court for review. *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973); *People v. Simms*, 185 Colo. 214, 523 P.2d 463 (1974).

Relief pursuant to section (b) of this rule is discretionary and the exercise of the sentencing court's discretion is generally not subject to appeal. However, defendant's appeal was not barred where the sentencing court declined to entertain the defendant's motion and exercise its discretion for the reason that it erroneously considered itself bound to impose a sentence to the department of corrections by statute. *Shipley v. People*, 45 P.3d 1277 (Colo. 2002).

Defendant's claim of statutory violation in imposition of consecutive sentences is barred in postconviction proceeding because it was available to defendant to be raised on his direct appeal and was not raised at that time. *People v. Banks*, 924 P.2d 1161 (Colo. App. 1996).

To merely charge that a trial proceeding was "unconstitutional" is wholly insufficient as a basis for relief or review in an appellate court. *Peirce v. People*, 158 Colo. 81, 404 P.2d 843 (1965).

Where motion specifies grounds for relief, trial court conducts hearing before appeal determined. Before the merits of an appeal can be determined, it might be necessary first that the trial court conduct a hearing into the merits of the allegations made in the petition for section (c) relief where the motion sets forth facts constituting proper grounds for relief. *Roberts v. People*, 158 Colo. 76, 404 P.2d 848 (1965);

Black v. People, 166 Colo. 358, 443 P.2d 732 (1968).

And hearing should be granted where facts supporting claim appear outside record. Where the very basis of defendant's claim of error is that the trial court should have granted an evidentiary hearing because the facts he alleges in his motion do not appear in the record, then, however regular the proceedings might appear from the trial transcript, it still might be the case that the petitioner did not make an intelligent and understanding waiver of his constitutional rights at trial if the facts on which petitioner's claim is predicated are outside the record, and the court should have granted evidentiary hearing. **Von Pickrell v. People**, 163 Colo. 591, 431 P.2d 1003 (1967).

Otherwise, state to furnish transcript on appeal to justify trial court's determination. Where the defendant asserts that his plea was involuntary for reasons not appearing on the record, it is incumbent on the state to provide the appellate court with a transcript which shows that the trial court at the time of a guilty plea made such inquiry as to justify its determination without a hearing on a section (c) petition that defendant's plea was voluntarily made. **Von Pickrell v. People**, 163 Colo. 591, 431 P.2d 1003 (1967).

Trial court's judgment not disturbed where evidence amply supports findings. Where the evidence before the trial court amply supports the findings and holding of the trial court, the judgment of the trial court on a section (c) motion will not be disturbed on review. **Lamb v. People**, 174 Colo. 441, 484 P.2d 798 (1971).

Vacation of guilty plea not upset absent extreme circumstances. When a trial judge holds a hearing on a section (c) motion and determines after hearing the testimony that the interests of justice require the vacation of a guilty plea and that a trial be held on the question of guilt or innocence, this determination will not be upset by an appellate court, except in extreme circumstances. **People v. Gantner**, 173 Colo. 92, 476 P.2d 998 (1970).

Denial of motion upheld where sufficient evidence to convict the defendant is found. **People v. Grass**, 180 Colo. 346, 505 P.2d 1301 (1973).

Including testimony of defendant at post-conviction hearing concerning truth of probation report. Where a motion under this rule asserts that the defendant was denied the opportunity to confront the witnesses furnishing the information contained in a probation report which he contends was incorrect and prejudicial to him, but at the hearing on this motion defendant was permitted to testify concerning the truth of the matters contained in the probation report and to give his explanation of them, the record supports the trial court's denial of the

motion. **Wolford v. People**, 178 Colo. 203, 496 P.2d 1011 (1972).

Trial court errs in not setting aside conviction where massive, prejudicial publicity. A trial court errs in determining that it cannot compare present day standards of newspaper conduct to past happenings in denying a motion under section (c) to set aside the conviction of a defendant, since the line of cases culminating in **Sheppard v. Maxwell**, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), hold that the publicity can be so "massive, pervasive, and prejudicial" that the denial of a fair trial may be presumed, and the court therefore also erred in holding that a showing must be made that the jurors were actually and directly affected by the publicity. **Walker v. People**, 169 Colo. 467, 458 P.2d 238 (1969).

And order denying motion reversed where rule on judicial plea-bargain inquiry not followed. The failure of a trial court to follow the requirements of Crim. P. 11, as to the inquiry to be conducted before the acceptance of a plea necessitates a reversal of the order of the trial court denying defendant's section (c) motion. **Westendorf v. People**, 171 Colo. 123, 464 P.2d 866 (1970).

Denial of motion reversed with directions to conduct new hearing. **People v. Burger**, 180 Colo. 415, 505 P.2d 1308 (1973).

Trial court erred in denying defendant's motion where defendant was not advised that, in addition to any term of incarceration, a separate and additional term of parole was a required consequence of his plea. **People v. Espinoza**, 985 P.2d 68 (Colo. App. 1999).

Setting definite execution date in order granting stay of execution not unconstitutional. The fact that an appellate court sets definite execution date in order granting a stay of execution pending the determination of post-conviction relief is not "suggestion of predetermination" in violation of due process and does not constitute an implied direction to deny petitioner relief. **Bell v. Patterson**, 279 F. Supp. 760 (D. Colo. 1968), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Court of appeals has jurisdiction to decide if trial court erred in granting a new trial under postconviction relief motion when issues in motion were brought pursuant to the "other remedies" portion of this rule. **People v. Naranjo**, 821 P.2d 836 (Colo. App. 1991).

An order of a trial court granting or denying a motion filed under section (c) of this rule is a final order reviewable on appeal. Such order becomes final after the period in which to perfect an appeal expires. **People v. Janke**, 852 P.2d 1271 (Colo. App. 1992); **People v. Ovalle**, 51 P.3d 1073 (Colo. App. 2002).

Since an appellate court is not in as good a position as the trial court to make factual

findings, the court of appeals erred in vacating respondent's conviction where the trial court denied the section (c) motion without a hearing. *People v. Simpson*, 69 P.3d 79 (Colo. 2003).

Trial court did not abuse its discretion in denying defendant's Crim. P. 35(c) motion without an evidentiary hearing on ineffective assistance of counsel claim. The defendant received sufficient notice from the Crim. P. 11 advisement form and had an affirmative obligation to request clarification at the providency hearing. *People v. DiGuglielmo*, 33 P.3d 1248 (Colo. App. 2001).

Once a final order under this rule is entered, the only means by which a trial court may alter, amend, or vacate such order is by an appropriate motion under C.R.C.P. 59 or 60. Accordingly, people's argument that the doctrine of law of the case authorizes trial court to reconsider final order is rejected. *People v. Janke*, 852 P.2d 1271 (Colo. App. 1992).

I. Federal Habeas Corpus.

In Colorado, habeas corpus is not a substitute for review by an appeal. *Martinez v. Patterson*, 382 F.2d 1002 (10th Cir. 1967).

Federal relief denied where state remedies under this rule not exhausted. A federal court will deny "habeas corpus" where one fails to exhaust state remedies by failing to seek state review of a trial court's denial of a motion under this rule. *Breckenridge v. Patterson*, 374 F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967); *Kanan v. Denver Dist. Court*, 438 F.2d 521 (10th Cir. 1971).

Where the petitioner fails to raise any of his allegations of error in state courts either by direct appeal or by means of this rule, he has not exhausted his state remedies on these issues and cannot obtain habeas corpus relief from the federal courts. *Thompson v. Ricketts*, 500 F. Supp. 688 (D. Colo. 1980).

But mere availability of possible remedy under this rule cannot preclude federal writ of "habeas corpus". *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963). But see *Breckenridge v. Patterson*, 374 F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967); *Kanan v. Denver Dist. Court*, 438 F.2d 521 (10th Cir. 1971).

Postconviction hearing unnecessary where state supreme court decision already controls question. Where the Colorado supreme court reaches a conclusion on the substantive issue stating it in such a way that under ordinary circumstances a trial court would feel bound by the decision, even though it is only dictum, and would therefore deny a motion made pursuant to section (c), on the grounds that the Colorado supreme court has already decided the question, then, for all practical purposes, the petitioner has exhausted his state remedies, and a petition for federal "habeas corpus" is proper. *Peters v. Dillon*, 227 F. Supp. 487 (D. Colo. 1964), aff'd, 341 F.2d 337 (10th Cir. 1965).

State remedies exhausted by prior prosecution of state "habeas" action. Where the federal "habeas corpus" act requires that a defendant exhaust one of his available alternative state remedies, the maintenance of a motion under this rule is not necessary where there has been prior prosecution of a "habeas corpus" action. *Martinez v. Tinsley*, 241 F. Supp. 730 (D. Colo. 1965).

Rule 36. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

ANNOTATION

Correction of error discretionary. The language of this rule indicates that the decision to correct an error is discretionary rather than mandatory. *Quintana v. People*, 200 Colo. 258, 613 P.2d 1308 (1980).

Judge may correct grammar and strike meaningless repetitions. A judge may correct or amend a record, to make certain perfunctory changes to correct grammar, and to strike meaningless repetitions. *People v. Emeson*, 179 Colo. 308, 500 P.2d 368 (1972).

And may correct mittimus to reflect sentence actually imposed. Where a mittimus recites what purports to be the sentence imposed,

but a clerical error in the mittimus quite obviously does not reflect the actual sentence intended to be imposed by the sentencing judge, the order of the trial judge correcting the mittimus to reflect the sentences actually imposed by the sentencing judge is the proper procedure. *People v. Mason*, 188 Colo. 410, 535 P.2d 506 (1975).

But cannot correct mistakes after commutation of sentence. Since the courts lack jurisdiction to alter or amend a commuted sentence imposed by the executive, a motion under this rule to correct clerical oversights in sentencing may not be granted after commutation. *People*

v. Quintana, 42 Colo. App. 477, 601 P.2d 637 (1979), *aff'd*, 200 Colo. 258, 613 P.2d 1308 (1980).

Clerical error in judgment of conviction, sentence, and mittimus concerning the sen-

tences imposed for sexual assault and kidnapping is proper grounds for remand to correct the error. *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

Rule 37. Appeals from County Court

(a) Filing Notice of Appeal and Docketing Appeal. The district attorney may appeal a question of law, and the defendant may appeal a judgment of the county court in a criminal action under simplified procedure to the district court of the county. To appeal the appellant shall, within 35 days after the date of entry of the judgment or the denial of posttrial motions, whichever is later, file notice of appeal in the county court, post such advance costs as may be required for the preparation of the record and serve a copy of the notice of appeal upon the appellee. He shall also, within such 35 days, docket the appeal in the district court and pay the docket fee. No motion for new trial or in arrest of judgment shall be required as a prerequisite to an appeal, but such motions if filed shall be pursuant to Rule 33(b) of these Rules.

(b) Contents of Notice of Appeal and Designation of Record. The notice of appeal shall state with particularity the alleged errors of the county court or other grounds relied upon for the appeal, and shall include a stipulation or designation of the evidence and other proceedings which the appellant desires to have included in the record certified to the district court. If the appellant intends to urge upon appeal that the judgment or a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. The appellee shall have 14 days after service upon him of the notice of appeal to file with the clerk of the county court and serve upon the appellant a designation of any additional parts of the transcript or record which he deems necessary. The advance cost of preparing the additional record shall be posted by the appellant with the clerk of the county court within 7 days after service upon him of the appellee's designation, or the appeal will be dismissed. If the district court finds that any part of the additional record designated by the appellee was unessential to a complete understanding of the questions raised by the appeal, it shall order the appellee to reimburse the appellant for the cost advanced for the preparation of such part without regard to the outcome of the appeal.

(c) Contents of Record on Appeal. Upon the filing of a notice of appeal and upon the posting of such advance costs by the appellant, as may be required for the preparation of a record, unless the appellant is granted leave to proceed as an indigent, the clerk of the county court shall prepare and issue as soon as may be possible a record of the proceedings in the county court, including the summons and complaint or warrant, the separate complaint if any has been issued, and the judgment. The record shall also include a transcription or a joint stipulation of such part of the actual evidence and other proceedings as the parties may designate. If the proceedings have been electrically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the court, either by him or under his supervision, within 42 days after judgment or within such additional time as may be granted by the county court. The clerk shall notify in writing the opposing parties of the completion of the record, and such parties shall have 14 days within which to file objections. If none are received, the record shall be certified forthwith by the judge. If objections are made, the parties shall be called for hearing and the objections settled by the county judge and the record then certified.

(d) Filing of Record. When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county court, and the opposing parties shall be notified by the clerk of the county court of such filing.

(e) Briefs. A written brief setting out matters relied upon as constituting error and outlining any arguments to be made shall be filed in the district court by the appellant within 21 days after certification of the record. A copy of the appellant's brief shall be served upon the appellee. The appellee may file an answering brief within 21 days after

such service. A reply brief may be filed within 14 days after service of the answering brief. In the discretion of the district court, the time for filing briefs and answers may be extended.

(f) Stay of Execution. Pending the docketing of the appeal, a stay of execution shall be granted by the county court upon request. If a sentence of imprisonment has been imposed, the defendant may be required to post bail, and if a fine and costs have been imposed, a deposit of the amount thereof may be required by the county court. Upon a request for stay of execution made any time after the docketing of the appeal, such action may be taken by the district court. Stays of execution granted by the county court or district court and, with the written consent of the sureties if any, bonds posted with such courts shall remain in effect until after final disposition of the appeal, unless modified by the district court.

(g) Trials de Novo; Penalty Not Increased. If for any reason an adequate record cannot be certified to the district court the case shall be tried de novo in that court. No action on appeal shall result in an increase in penalty.

(h) Judgment; How Enforced. Unless there is further review by the Supreme Court upon writ of certiorari pursuant to the rules of such court, after final disposition of the appeal the judgment on appeal entered by the district court shall be certified to the county court for action as directed by the district court, except in cases tried de novo by the district court or in cases in which the district court modifies the county court judgment, and in such cases, the judgment on appeal shall be that of the district court and so enforceable.

(i) Appeals to Superior Court. In counties in which a superior court has been established, appeals from the county court shall be taken to the superior court rather than the district court. All of the provisions of this section governing appeals from the county court to the district court are applicable when the appeal is taken to the superior court, and the term "district court" as used in this section shall be understood to include the superior court.

Source: (a), (b), (c), and (e) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a recent case relating to the right of appeal, see 15 Colo. Law. 1613 (1986).

Appeals between county and superior courts. The district court has no jurisdiction to interfere with the appeal process between the county and superior courts. *Petry v. County Court*, 666 P.2d 1125 (Colo. App. 1983).

This rule does not give authority to the court of appeals to hear an appeal of a district court judgment modifying a county court decision. The modified county judgment becomes a district court judgment only for purposes of enforcement. *People v. Smith*, 874 P.2d 452 (Colo. App. 1993).

Because appellant's conviction originated in a municipal court of record, appellant had 30 days following the judgment of conviction to file the notice of appeal pursuant to § 13-10-116, this rule, and C.M.C.R. 237. *Normandin v. Town of Parachute*, 91 P.3d 383 (Colo. 2004).

Finality attaches upon expiration of 30 days from judgment. Where judgment and sentence had been entered in the county court,

at the expiration of 30 days — no notice of appeal having been filed — it became final. *Mills v. People*, 181 Colo. 168, 509 P.2d 594 (1973).

And time to file appeal not automatically extended by new trial motion. The filing of a motion for a new trial does not have the effect of automatically extending the time to file a notice of appeal as prescribed by this rule. *Mills v. People*, 181 Colo. 168, 509 P.2d 594 (1973).

Appeals filing period begins to run when the judgment becomes final — that is when sentence has been passed — even though sentencing has been delayed for over a year due to defendant's voluntary unavailability. *Hellman v. Rhodes*, 741 P.2d 1258 (Colo. 1987).

For purposes of appeal, a final judgment must include the sentence. Therefore, after the sentence was vacated on appeal, an order withdrawing plea of guilty was not a final judgment. *Ellsworth v. People*, 987 P.2d 264 (Colo. 1999).

A trial de novo conducted by the district court is not a review of the county court judgment; it is an entirely new proceeding. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Only in cases tried de novo by the district court will the district court judgment be sub-

ject to direct appeal. Justifiably, then, the defendant may seek direct appeal when the district court enters its judgment from a de novo trial. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Certiorari review does not suffice as an appellate review from a final judgment of the district court. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Transcript of all evidence presented to lower court relevant to challenged ruling required. Where an appellant challenges a ruling that was based, either in whole or in part, on evidence presented to the lower court, a transcript of all evidence pertaining to the decision must be included in the record; however, the appellant is not required by Crim. P. 37(b), to include in the record a transcript of evidence that is not relevant to the issues raised on appeal. *Holcomb v. City & County of Denver*, 199 Colo. 251, 606 P.2d 858 (1980); *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

Filing a notice of appeal in the county court is not a jurisdictional requirement of subsection (a) of this rule, but timely docketing an appeal in the district court is sufficient to invoke the appellate jurisdiction of that court. *Peterson v. People*, 113 P.3d 706 (Colo. 2005).

Timely filing of a brief is not jurisdictional under this rule, and a trial court's discretion to

extend the time to file a brief under section (e) is not restricted to extensions requested within the normal filing time. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

Excusable or inexcusable neglect considered in deciding whether to reinstate after late brief. Although no "excusable neglect" prerequisite appears in section (e), the court may consider excusable or inexcusable neglect among other factors in deciding whether to grant a motion to reinstate after late filing of a brief. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

Unavailability or inadequacy of record mandates trial de novo. If the record is unavailable, a defendant should not suffer for the lack thereof, but should be afforded an entirely new trial; if a record is inadequate, the district court must grant a trial de novo under section (g). It has no discretion in the matter. *Hawkins v. Superior Court*, 196 Colo. 86, 580 P.2d 811 (1978).

Applied in *People v. Lessar*, 629 P.2d 577 (Colo. 1981); *People v. Luna*, 648 P.2d 624 (Colo. App. 1982); *Waltmeyer v. People ex rel. City of Arvada*, 658 P.2d 264 (Colo. 1983); *Dike v. People*, 30 P.3d 197 (Colo. 2001).

Rule 37.1. Interlocutory Appeal from County Court

(a) **Grounds.** The prosecuting attorney may file an interlocutory appeal in the district court from a ruling of a county court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the prosecuting attorney certifies to the judge who granted such motion and to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) **Filing Notice of Appeal.** The prosecuting attorney shall file the notice of appeal with the clerk of the district court and shall serve the defendant and the clerk of the trial court with a copy thereof. Such notice of appeal shall be filed within 14 days of the entry of the order being appealed and any docket fee shall be paid at the time of the filing.

(c) **Contents of Record on Appeal.** The record for an interlocutory appeal shall consist of the information or charging document, the motions filed by the defendant or defendants and the grounds stated in section (a) above, a transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the parties may designate (subject to the provisions in C.A.R. 11(b) pertaining to exhibits of bulk), the order of court ruling on said motions and the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. The record shall be filed within 14 days of the date of filing the notice of appeal, and may be supplemented by order of the district court.

(d) **Briefs.** Within 14 days after the record has been filed in the district court, the prosecuting attorney shall file an opening brief. Within 14 days after service of said opening brief, the defendant shall file an answer brief, and the prosecuting attorney shall have 7 days after service of said answer brief to file a reply brief.

(e) **Disposition of Cause.** Unless oral argument is ordered by the court and it rules on the record and in the presence of the parties, the decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to all parties. No petition for rehearing shall be permitted. A certified copy of the

judgment and directions to the county court, and a copy of the written opinion, if any, shall constitute the mandate of the district court, concluding the appeal and restoring jurisdiction to the county court. Such mandate shall issue and be transmitted by the clerk of the court by mail to the trial judge and all parties on the 44th day after the district court's oral or written order, unless the district court is given notice by one of the parties that it has sought further review by the supreme court upon a writ of certiorari pursuant to the rules of that court, in which case the mandate shall issue upon notification that certiorari has been denied or upon receiving the remittitur of the supreme court.

(f) **Time.** The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

(g) If no procedure is specifically prescribed by this rule, the court shall look to the Rules of Appellate Procedure for guidance.

(h) Nothing in this Rule 37.1 shall be construed to deprive the county court of jurisdiction to consider bail issues during the pendency of the interlocutory appeal.

Source: Added July 16, 1992, effective November 1, 1992; (b) to (e) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

The 10-day time frame under subsection (b) for filing an interlocutory appeal is to be calculated according to C.A.R. 26(a), with in-

tervening Saturdays, Sundays, and legal holidays excluded in the computation. People v. Zhuk, 239 P.3d 437 (Colo. 2010).

Rule 38. Appeals from the District Court

Appeals from the district court shall be conducted pursuant to the Colorado Appellate Rules.

Source: Entire rule amended and adopted June 27, 2002, effective July 1, 2002.

Rule 39. Stays

The filing of an interlocutory appeal or an appeal from an order that dismisses one or more counts of a charging document prior to trial automatically stays all proceedings until final determination of the appeal, unless the appellate court lifts such stay in whole or in part.

Source: Entire rule added and adopted June 27, 2002, effective July 1, 2002.

Rule 40. (Reserved)

VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 41. Search, Seizure, and Confession

(a) **Authority to Issue Warrant.** A search warrant authorized by this Rule may be issued by any judge of a court of record.

(b) **Grounds for Issuance.** A search warrant may be issued under this Rule to search for and seize any property:

- (1) Which is stolen or embezzled; or
- (2) Which is designed or intended for use as a means of committing a criminal offense; or
- (3) Which is or has been used as a means of committing a criminal offense; or
- (4) The possession of which is illegal; or
- (5) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(6) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(7) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to public health.

(c) **Application for Search Warrant.** (1) A search warrant shall issue only on affidavit sworn or affirmed to before the judge, except as provided in (c)(3). Such affidavit shall relate facts sufficient to:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) Establish the grounds for issuance of the warrant, or probable cause to believe that such grounds exist; and

(IV) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(2.5) A no-knock search warrant, which means, for purposes of this section, a search warrant authorized by the court to be executed by law enforcement officers through a forcible entry without first announcing their identity, purpose, and authority, shall be issued only if the affidavit for such warrant:

(I) Complies with the provisions of subsections (1) and (2) of this section (c) and section 16-3-303(4), C.R.S.;

(II) Specifically requests the issuance of a no-knock search warrant;

(III) Relates sufficient circumstances to support the issuance of a no-knock search warrant;

(IV) Has been reviewed and approved for legal sufficiency and signed by a district attorney with the date and his or her attorney registration number on the affidavit, pursuant to section 20-1-106.1(2), C.R.S.; and

(V) If the grounds for the issuance of a no-knock warrant are established by a confidential informant, the affidavit for such warrant shall contain a statement by the affiant concerning when such grounds became known or were verified by the affiant, but such statement shall not identify the confidential informant.

(3) **Application and Issuance of a Warrant by Facsimile or Electronic Transmission.** A warrant, signed affidavit, and accompanying documents may be transmitted by electronic facsimile transmission (fax) or by electronic transfer with electronic signatures to the judge, who may act upon the transmitted documents as if they were originals. A warrant affidavit may be sworn to or affirmed by administration of the oath over the telephone by the judge. The affidavit with electronic signature received by the judge or magistrate and the warrant approved by the judge or magistrate, signed with electronic signature, shall be deemed originals. The judge or magistrate shall facilitate the filing of the original affidavit and original warrant with the clerk of the court and shall take reasonable steps to prevent the tampering with the affidavit and warrant. The issuing judge or magistrate shall also forward a copy of the warrant and affidavit, with electronic signatures, to the affiant. This subsection (c)(3) does not authorize the court to issue warrants without having in its possession either a faxed copy of the signed affidavit and warrant or an electronic copy of the affidavit and warrant with electronic signatures.

COMMITTEE COMMENT

For purposes of this rule, the term "electronic signature" has the same meaning as used in C.R.S. § 16-1-106(4)(c).

(d) Issuance, Contents, Execution, and Return of Warrant. (1) If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that such grounds exist, he shall issue a search warrant, which shall:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) State the grounds or probable cause for its issuance; and

(IV) State the names of the persons whose affidavits of testimony have been taken in support thereof.

(2) The search warrant may also contain such other and further orders as the judge may deem necessary to comply with the provisions of a statute, charter, or ordinance, or to provide for the custody or delivery to the proper officer of any property seized under the warrant, or otherwise to accomplish the purposes of the warrant.

(3) Unless the court otherwise directs, every search warrant authorizes the officer executing the same:

(I) To execute and serve the warrant at any time; and

(II) To use and employ such force as may reasonably be necessary in the performance of the duties commanded by the warrant.

(4) **Joinder.** The search of one or more persons, premises, places, or things, may be commanded in a single warrant or in separate warrants, if compliance is made with Rule 41(c)(1)(IV) of these Rules.

(5) **Execution and Return.** (I) Except as otherwise provided in this Rule, a search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located.

(II) Any judge issuing a search warrant, for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported may make an order authorizing a peace officer to be named in such warrant to execute the same, and the person named in such order may execute such warrant anywhere in the state. All sheriffs, coroners, police officers, and officers of the Colorado State Patrol, when required, in their respective counties, shall aid and assist in the execution of such warrant. The order authorized by this subsection (5) may also authorize execution of the warrant by any officer authorized by law to execute it in the county wherein the property is located.

(III) When any officer, having a warrant for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported, shall be in pursuit thereof and such person, motor vehicle, aircraft, or other object shall cross or enter into another county, such officer is authorized to execute the warrant in such other county.

(IV) It shall be the duty of all peace officers into whose hands any search warrant shall come, to execute the same, in their respective counties or municipalities, and make due return thereof.

(V) The officers executing a search warrant shall first announce their identity, purpose, and authority, and if they are not admitted, may make a forcible entry into the place to be searched; however, the officers may make forcible entry without such prior announcement if the warrant expressly authorizes them to do so or if the particular facts and circumstances known to them at the time the warrant is to be executed adequately justify dispensing with this requirement.

(VI) A search warrant shall be executed within 14 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by

the officer. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

- (1) The property was illegally seized without warrant; or
- (2) The warrant is insufficient on its face; or
- (3) The property seized is not that described in the warrant; or
- (4) There was not probable cause for believing the existence of the grounds on which the warrant was issued; or
- (5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

(f) **Return of Papers to Clerk.** The judge who has issued a warrant shall attach to the warrant a copy of the return, inventory, and all other documents in connection therewith, including any affidavit in application for the warrant, and shall file them with the clerk of the district court for the county of origin. If a case has been filed in the district court after issuance of the warrant, the clerk of the district court shall notify the clerk of the county court which issued it that the warrant has been filed in the district court. When the warrant has been issued by the county judge and there is no subsequent filing in the district court, after the issuance of the warrant, the documents shall remain in the county court. Any documents transmitted by fax or electronic transmission to the judge to obtain the warrant and the documents transmitted by the judge to the applicant shall be filed with the clerk of the court.

(g) **Suppression of Confession or Admission.** A defendant aggrieved by an alleged involuntary confession or admission made by him, may make a motion under this Rule to suppress said confession or admission. The motion shall be made and heard before trial unless opportunity therefor did not exist or defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial. The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

(h) **Scope and Definition.** This Rule does not modify any statute, inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

COMMITTEE COMMENT

This rule is intended to facilitate the issuance of warrants by eliminating the need to physically carry the supporting affidavit to the judge.

Source: The introductory portion to (c), (c)(3), and (f) amended July 16, 1993, effective November 1, 1992; entire rule amended and effective October 4, 2001; entire rule corrected and effective October 22, 2001; entire rule corrected and effective October 25, 2001; (d)(5)(VI) amended May 7, 2009, effective July 1, 2009; (c)(3) and (f) amended and effective February 10, 2011; (c)(3) amended and effective June 16, 2011; (d)(5)(VI) amended and adopted December 14, 2011, effective July 1, 2012.

Editor's note: The 2001 amendments to this section added a new (d)(5)(V) and renumbered the existing (d)(5)(V) as (d)(5)(VI).

ANNOTATION

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I. GENERAL CONSIDERATION.

Law reviews. For note, "Search and Seizure Since *Mapp*", see 36 U. Colo. L. Rev. 391 (1964). For comment on *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963), appearing below, see 36 U. Colo. L. Rev. 435 (1964). For article, "Attacking the Seizure — Overcoming Good Faith", see 11 Colo. Law. 2395 (1982). For comment, "Colorado's Approach to Searches and Seizures in Law Offices", see 54 U. Colo. L. Rev. 571 (1983). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with post-arrest silence and searches, see 61 Den. L.J. 281 (1984). For article, "The Demise of the Aquilar-Spinelli Rule: A Case of Faulty Reception", see 61 Den. L.J. 431 (1984). For comment, "The Good Faith Exception: The Seventh Circuit Limits the Exclusionary Rule in the Administrative Context", see 61 Den. L.J. 597 (1984). For article, "Veracity Challenges in Colorado: A Primer", see 14 Colo. Law. 227 (1985). For article, "Consent Searches: A Brief

Review", see 14 Colo. Law. 795 (1985). For article, "Criminal Procedure", which discusses recent Tenth Circuit decisions dealing with searches, see 62 Den. U. L. Rev. 159 (1985). For article, "Civil Action for Return of Property: 'Anomalous' Federal Jurisdiction in Search of Justification", see 62 Den. U. L. Rev. 741 (1985). For article, "People v. Mitchell: The Good Faith Exception in Colorado", see 62 Den. U. L. Rev. 841 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses recent cases relating to protection from searches and warrant requirements, see 15 Colo. Law. 1564 and 1566 (1986). For article, "Criminal Procedure", which discusses recent Tenth Circuit decisions dealing with unreasonable searches and seizures, see 65 Den. U. L. Rev. 535 (1988).

Applied in *Secombe v. District Court*, 180 Colo. 420, 506 P.2d 153 (1973); *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976); *People v. Fletcher*, 193 Colo. 314, 566 P.2d 345 (1977); *People v. Valdez*, 621 P.2d 332 (Colo. 1981); *People v. Conwell*, 649 P.2d 1099 (Colo. 1982); *People v. Lindsey*, 660 P.2d 502 (Colo. 1983); *People v. Roybal*, 672 P.2d 1003 (Colo. 1983).

II. CONSTITUTIONAL PROTECTIONS.

State courts to resolve search and seizure problems in light of constitutional guarantees. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), does not by its terms nationalize the law of search and seizure, but it does compel state courts to examine and resolve the problems arising from the search for and the seizure of evidence in the light of state and federal constitutional guarantees against unlawful searches and seizures. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

And state rules proper, provided they do not violate federal constitution. Rules establishing workable state procedures governing searches and seizures, even though they may not be strictly in accord with federal procedures, are proper provided that such rules do not violate the fourth amendment proscription against unreasonable searches and seizures. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

Thus, this rule issued to implement constitutional guarantees. As a result of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and to implement the constitutional guarantees against unlawful searches and seizures, the supreme court of Colorado on November 1, 1961, initially issued this rule providing for the manner in which search warrants should be issued and making property obtained

by an unlawful search and seizure inadmissible in evidence in the courts of this state, provided timely motions to suppress are made. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

Though use of search warrant has long been encouraged in Colorado. It has long been the policy of the supreme court of Colorado and other courts to encourage the use of the search warrant as a most desirable method of protecting and preserving the constitutional rights of the accused. *People v. Whisenhunt*, 173 Colo. 109, 476 P.2d 997 (1970).

But previous statute on issuance of search warrants held unconstitutional. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970); *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971) (decided under § 48-5-11(3), C.R.S. 1963).

Federal constitution guarantees security of persons against unreasonable searches. The fourth amendment to the United States Constitution does not guarantee the security of persons against all searches but only those which are unreasonable. *Moore v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

And practical accuracy determines whether warrant complies with constitutional requirements. The standard for determining whether search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety. *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974).

No constitutional violation when prison cells "shaken down". Considering normal and necessary prison practices and the charge placed upon prison officials to supervise the operation of state prisons, to preserve order and discipline therein, and to maintain prison security, there is no violation of the fourth amendment prohibition against unreasonable search and seizure when prison cells are searched or "shaken down" in carrying out this charge. *Moore v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

So long as searches not cruel, or conducted for harassing or humiliating purposes. Searches conducted by prison officials entrusted with the orderly operation of the prisons are not unreasonable so long as they are not conducted for the purpose of harassing or humiliating the inmate or in a cruel or unusual manner. *Moore v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

And seizure of business records not unconstitutional where records instrumentalities of crime. Seizure of records does not violate defendant's privilege against self-incrimination where defendant is not "compelled" to produce the papers, the papers are not communicative in nature, they are business records of which others must have knowledge rather than personal and private writings, and they are instrumentalities of the crime with which defendant is

charged. *People v. Tucci*, 179 Colo. 373, 500 P.2d 815 (1972).

Voluntary surrender of nontestimonial evidence waives any constitutional protections. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

III. APPLICABILITY OF RULE.

Validity of a search warrant is to be judged under this rule. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970); *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

Consequently, it is necessary for search warrant to comply with provisions of this rule. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

But only unlawfully seized or obtained evidence or confession suppressed. This rule provides only for motions to suppress physical evidence unlawfully seized, as well as confessions and statements unlawfully obtained, from accused defendants. *People v. McNulty*, 173 Colo. 491, 480 P.2d 560 (1971).

Mandatory pretrial suppression of evidence hearing only for matters listed in rule. There is nothing in the Colorado Rules of Criminal Procedure which contemplates a mandatory pretrial suppression of evidence hearing other than for the matters listed in sections (e) and (g) of this rule, viz., evidence obtained because of an illegal search and seizure or an extrajudicial confession or admission. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970).

Therefore, this rule does not encompass motions for suppression of testimonial evidence. *People v. McNulty*, 173 Colo. 491, 480 P.2d 560 (1971).

Nor motions for suppression of identification testimony. Where the defendant contends that he was not afforded counsel during a lineup and that the lineup was overly suggestive, so that identification testimony should not be allowed into evidence, such a matter is to be resolved at trial rather than pursuant to this rule. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970).

Likewise, whether an arrest is without probable cause is a subject which may not properly be considered under a motion to suppress. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Interlocutory appeals by state made only from adverse suppression rulings governed by rules. C.A.R. 4.1, which provides for interlocutory appeals by the state, is designed to review rulings of the trial court made upon suppression hearings under sections (e) and (g) of this rule; where objections to proposed evidence do not come within these sections, rulings on the same are not subject to review under C.A.R. 4.1. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970); *People v. McNulty*, 173 Colo. 491, 480 P.2d 560 (1971); *People v.*

Henry, 173 Colo. 523, 482 P.2d 357 (1971); *People v. Patterson*, 175 Colo. 19, 485 P.2d 494 (1971); *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971) (all cases decided prior to 1979 amendment of C.A.R. 4.1).

Under C.A.R. 4.1, interlocutory appeals may only be made by the state from adverse rulings by a district court to motions made pursuant to sections (e) and (g) of this rule and Crim. P. 41.1(i). *People v. Morgan*, 619 P.2d 64 (Colo. 1980).

IV. AUTHORITY TO ISSUE WARRANT.

Only judicial officer may issue search warrant. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *Mayorga v. People*, 178 Colo. 106, 496 P.2d 304 (1972).

And only such authority may modify warrant. It is axiomatic that the right to alter, modify, or correct a warrant is necessarily vested only in a judicial authority. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *Mayorga v. People*, 178 Colo. 106, 496 P.2d 304 (1972).

So, alteration of search warrant by police officer is usurpation of judicial function and is therefore improper. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

But warrant modified before issued by judge not subject to challenge. Where changes and modifications on a search warrant take place before it is signed and issued by a judge, the validity of the search warrant is not subject to challenge. *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

V. APPLICATION FOR WARRANT.

A. General Procedural Requirements.

Rule requires affidavit to support search warrant, which establishes the grounds for the issuance of the warrant, and demands that the affidavit be sworn to before a judge. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Which must comply with United States supreme court standards. If a search warrant is to be sustained, the affidavit must comply with the standards set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, 10 A.L.R.3d 359 (1966), and in *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

But technical requirements and elaborate specificity are not required in the drafting of affidavits for search warrants. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Probable cause must be supported by oath or affirmation reduced to writing. The fourth amendment to the United States constitution requires probable cause supported by oath or

affirmation as a condition precedent to the valid issuance of a search warrant; § 7 of art. II, Colo. Const., is even more restrictive and provides that probable cause must be supported by oath or affirmation reduced to writing. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Under the Colorado Constitution, the warrant can only be issued upon probable cause supported by oath or affirmation which is "reduced to writing". *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

And verbal communication insufficient. Verbal communication of facts, as contrasted with written communication, will not suffice to establish probable cause. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Previously, this rule did not require affidavit to be attached to search warrant. *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971); *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

Admission of evidence seized from a defendant's residence pursuant to a defective warrant did not constitute reversible error, even though warrant was issued based on an affidavit inadvertently failing to allege facts linking defendant to the residence to be searched. *People v. Deitchman*, 695 P.2d 1146 (Colo. 1985).

Failure for good cause to comply with subsection (c)(1) of this rule, which requires affidavits for search warrants to be sworn to or affirmed before the issuing judge, does not constitute a constitutional violation that automatically triggers the exclusionary rule. *People v. Fournier*, 793 P.2d 1176 (Colo. 1990).

B. Role of Courts and Police.

Probable cause determined by detached magistrate, not police officer. Search warrants must be supported by evidentiary affidavits containing sufficient facts to allow "probable cause" to be determined by a detached magistrate instead of the accusing police officer. *Brown v. Patterson*, 275 F. Supp. 629 (D. Colo. 1967), *aff'd*, 393 F. 2d 733 (10th Cir. 1968).

Existence of probable cause must be determined by a member of the judiciary rather than by a law enforcement officer who is employed to apprehend criminals and to bring before the courts for trial those who would violate the law. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Be it a judge of the supreme, district, county, or superior court. The determination of whether probable cause exists is a judicial function to be performed by the issuing magistrate, which in Colorado may be any judge of the supreme, district, county, or superior court under this rule, and is not a matter to be left to the discretion of a police officer. *Hernandez v.*

People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

And to dispense with this requirement would render search warrant itself meaningless, since it would allow a police officer to subjectively determine probable cause. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968).

Police officer's role limited to providing judge with facts to make proper determination. The role of the police officer in search warrant practice is limited solely to providing the judge with facts and trustworthy information upon which he, as a neutral and detached judicial officer, may make a proper determination. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavits for warrants interpreted by magistrates in common-sense fashion. Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

And judge, in determining sufficiency, looks to four corners of affidavit. In determining whether the affidavit is sufficient, the judge must look within the four corners of the affidavit to determine whether there are grounds for the issuance of a search warrant. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); People v. Woods, 175 Colo. 34, 485 P.2d 491 (1971); People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

Issuing magistrate need only state result that probable cause exists. This rule was not intended to require the issuing magistrate to reiterate his mental process for reaching the result that probable cause exists, but rather to require only that he state that the result has been reached. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971); People v. Noble, 635 P.2d 203 (Colo. 1981).

Reasons given for search judicially reviewed by standards appropriate for reasonable police officer. Where an officer believes he has probable cause to search and states his reasons, an appellate court will not examine such reasons grudgingly, but will measure them by standards appropriate for a reasonable, cautious, and prudent police officer trained in the type of investigation which he is making. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

For negative attitude by reviewing courts discourages police from submitting evidence before acting. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

C. Underlying Facts and Circumstances.

Issuing magistrate to be apprised of underlying facts and circumstances showing probable cause. Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause to believe that proper grounds for the issuance of the warrant exist. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973); People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

The police must show to the issuing magistrate the underlying facts and circumstances upon which the magistrate can determine that probable cause exists for the issuance of a warrant. People v. Massey, 178 Colo. 141, 495 P.2d 1141 (1972).

And it is elementary and of no consequence that police have additional information which could provide a basis for the issuance of the warrant. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Mere affirmation of the belief or suspicion on the officer's part is not enough, for to hold otherwise would attach controlling significance to the officer's belief rather than to the magistrate's judicial determination. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Mere conclusory belief or suspicion by an affiant officer is not enough upon which to base the issuance of a search warrant. People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

Nor will affiant's conclusory declaration that he has probable cause add strength to the showing made. People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

For without facts, affidavits fatally defective. Affidavits containing only the conclusion of the police officer that he believes that certain property is on the premises or person and that such property is designed, or intended, or is, or has been, used as a means of committing a criminal offense, or the possession of which is illegal, without setting forth facts and circumstances from which the judicial officer can determine whether probable cause exists are fatally defective. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

And warrant issued on basis of mere conclusion deemed nullity. Where the mere conclusions by an officer provide nothing from which the judge can make an independent determination of probable cause, a warrant issued on the basis of such an affidavit is a nullity. People v. Baird, 172 Colo. 112, 470 P.2d 20 (1970).

But a search warrant may be based on hearsay, as long as a substantial basis for crediting the hearsay exists. *People v. Woods*, 175 Colo. 34, 485 P.2d 491 (1971).

Police officer's statements in affidavit that are erroneous and false must be stricken and may not be considered in determining whether the affidavit will support the issuance of a search warrant. *People v. Malone*, 175 Colo. 31, 485 P.2d 499 (1971).

Where the information supplied by an affiant which supports the issuance of a search warrant is false, the trial court has no alternative but to strike the admittedly erroneous information which the affiant supplied. *People v. Hampton*, 196 Colo. 466, 587 P.2d 275 (1978).

But other information supplied by affidavit not ignored. Fact that some portions of affidavit are erroneous does not require the issuing magistrate to ignore the other information supplied by the affidavit. *People v. Hampton*, 196 Colo. 466, 587 P.2d 275 (1978).

And where affidavit still sufficient, court will not strike down warrant. Where the affidavit still contains material facts sufficient as a matter of law to support the issuance of a warrant after the deletion of erroneous statements, the court will not strike down the warrant because the affidavit is not completely accurate. *People v. Malone*, 175 Colo. 31, 485 P.2d 499 (1971).

Verbal communications cannot correct deficient affidavit. Verbal communications, to the magistrate, of additional supporting information cannot correct an affidavit which is basically deficient in its statement of the underlying facts and the circumstances relied upon. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

But sworn testimony to supplement warrant, or amendment of affidavit, may be required. Should the judge to whom application has been made for the issuance of a search warrant determine that the affidavit is insufficient, he can require that sworn testimony be offered to supplement the warrant or can demand that the affidavit be amended to disclose additional facts, if a search warrant is to be issued. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavit containing stale information. Although crimes were perpetrated eight months prior to application for search warrant, because officers proceeded with all due diligence upon discovery of information upon which to base request for a search warrant, the affidavit was sufficient to establish probable cause. *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Anticipatory warrants are barred by language of rule and identical language in § 16-3-303 requiring that property to be searched for, seized, or inspected "is located at, in, or upon" premise, person, place, or thing to be searched. *People v. Poirez*, 904 P.2d 880 (Colo. 1995).

D. Finding of Probable Cause.

Police entry into individual's private domain made only upon showing of probable cause. It is only upon a showing of probable cause that the legal doors are opened to allow the police to gain official entry into an individual's domain of privacy for the purpose of conducting a search or to make an official seizure under the constitution. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Not necessary to specifically allege that possession of articles illegal. To establish the grounds in an affidavit it is not necessary that the person seeking the search warrant specifically allege therein the conclusion that the possession of the articles is illegal. *People v. Whisenhunt*, 173 Colo. 109, 476 P.2d 997 (1970); *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Or that the use thereof is illegal. Where an affidavit identifies the articles in question and alleges where they are located, but does not state that the possession or use thereof is illegal, the fact that the illegality is not set forth in the affidavit does not prevent the issuance of a search warrant. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

But warrant issues upon judge finding grounds established, or probable cause therefor. This rule provides that if the judge is satisfied from the facts alleged in the affidavit that the existence of one or more of the grounds for the issuance of a warrant has been established or that there is probable cause to believe that one or more grounds for issuing the warrant exist, then it should issue. *People v. Whisenhunt*, 173 Colo. 109, 476 P.2d 997 (1970); *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Warrant authorized upon connection being provided between evidence and criminal activity. One test for authorizing a search warrant for the seizure of certain articles is: Does the evidence in itself or with facts known to the officer prior to the search, excluding any facts subsequently developed, provide a connection between the evidence and criminal activity? *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Probable cause exists where facts warrant reasonable belief offense committed. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been, or is being, committed. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971); *Finley v. People*, 176 Colo. 1, 488 P.2d 883 (1971).

Moreover, in dealing with probable cause, one deals with probabilities; these are not

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971); *Finley v. People*, 176 Colo. 11, 488 P.2d 883 (1971).

Hence, the odor of a decomposing body is certainly probable cause for obtaining a search warrant. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

Affidavit must support probable cause finding as to each place searched. The fact that places to be searched were apartments rather than single-family residences does not alter the rule that an affidavit must support a finding of probable cause as to each separate place to be searched. *People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973).

Affidavit detailing various items at named address presents sufficient facts showing probable cause. Where the affidavit of a police officer in support of a search warrant sets forth at length the various items of information regarding the presence of certain articles at a named address, elaborating in detail on the items of police surveillance and discovery of such, such an affidavit presents ample and sufficient facts showing probable cause for the issuance of the search warrant. *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

Officers rightly in defendant's residence entitled to seize stolen items in plain view. If the supporting affidavit was sufficient to provide probable cause for issuance of a warrant, are the searching officers are rightfully in the defendant's residence, then the officers are entitled to seize items in plain view which they recognize as stolen. *People v. Espinoza*, 195 Colo. 127, 575 P.2d 851 (1978).

Even if not false, statements of officer-affiants may be so misleading that a finding of probable cause may be deemed erroneous. *People v. Winden*, 689 P.2d 578 (Colo. 1984).

Probable cause to issue a search warrant for a residence was sufficiently established by affidavit that was based primarily on information provided by confidential police informant and only thinly corroborated by independent police investigation. The "totality of circumstances" test for determining whether probable cause existed for issuing warrant was met. *People v. Paquin*, 811 P.2d 394 (Colo. 1991).

Where only non-criminal activity is corroborated by independent police investigation, the question of whether probable cause exists focuses on the degree of suspicion that attaches to the types of corroborated non-criminal acts and whether the informant provides details that are not easily obtained. *People v. Pacheco*, 175 P.3d 91 (Colo. 2006).

E. Informers.

Affidavit for search warrant based on an informant's information must meet a two-

pronged test requiring that the officer establish: (1) The underlying circumstances from which the informant concluded what he claims, and (2) some of the underlying circumstances from which the officer concludes that the informant is credible or his information reliable. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970); *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711 (1971); *Stork v. People*, 175 Colo. 324, 488 P.2d 76 (1971).

The standards of probable cause for issuance of search warrant based on information given to affiant police officer by unidentified informant are that the affidavit must: (1) Allege facts from which the issuing magistrate can independently determine whether there are reasonable grounds to believe that an illegal activity is being carried on in the place to be searched; and (2) set forth sufficient facts to allow the magistrate to determine independently if the informer is credible or his information reliable. *People v. Peschong*, 181 Colo. 29, 506 P.2d 1232 (1973); *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973); *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973); *People v. Masson*, 185 Colo. 65, 521 P.2d 1246 (1974).

The two-pronged test which emphasizes the basis upon which an informer's tip will provide a foundation for the issuance of a search warrant requires that the affidavit set forth: (1) The underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion; and (2) support of the affiant's claim that the informant was credible or his information reliable. *People v. McGill*, 187 Colo. 65, 528 P.2d 386 (1974); *People v. Dailey*, 639 P.2d 1068 (Colo. 1982).

And informant's personal knowledge satisfies first prong of test. Personal observation by informant of the objects of the search within the place to be searched satisfied the first prong of establishing probable cause. *People v. Ward*, 181 Colo. 246, 508 P.2d 1257 (1973); *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

The requirement that the affidavit for a search warrant set forth underlying circumstances so as to enable a magistrate to independently judge the validity of the informant's conclusion that criminal activity exists can be satisfied by the assertion of personal knowledge of the informant. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

Where the affiant states that the informant personally observed illegal property in the premises to be searched, this statement is sufficient to permit the issuing magistrate to determine independently that there were reasonable grounds to believe that illegal activity was being carried on in the place to be searched. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

Where it appears that the informant personally saw an illegal narcotic on the premises, that

he was given an illegal narcotic by someone on the premises and that he observed other illegal narcotics at the time he left the premises, these facts are sufficient to allow a magistrate to determine whether there was probable cause to determine presence of illegal activity. *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973).

But informant's information insufficient where place searched not connected with illegal substance. An affidavit, while stating that an informant was present when defendants sold contraband, but does not state that he was ever in the defendants' place, that he had seen such contraband in the defendants' place, or that he had witnessed the sale of such in the defendants' place is not sufficient information upon which to base a search warrant of defendants' place. *People v. Massey*, 178 Colo. 141, 495 P.2d 1141 (1972).

Also, affidavit insufficient if no explanation of how information received. An affidavit is insufficient to support a finding of probable cause where the officer does not more than state that he received information from an investigator who received the information from a reliable source and there is nothing in the affidavit concerning personal knowledge of the facts on the part of either officer, the facts upon which the informant based his information, or the circumstances from which the officers could conclude that the informant is credible or his information reliable. *People v. Baird*, 172 Colo. 112, 470 P.2d 20 (1970).

An affidavit does not meet the test if there is no explanation as to how the police obtained the information, nor does the affidavit set forth who made the observation or whether the information was obtained from an eyewitness or from a person who received the information indirectly. *People v. Myers*, 175 Colo. 109, 485 P.2d 877 (1971).

Magistrate must be shown facts to form basis for believing informant's information reliable. Some facts must also be shown to a magistrate upon which he can form a basis for believing information supplied by an informer is credible or the informer reliable. *People v. Massey*, 178 Colo. 141, 495 P.2d 1141 (1972).

There must be a comprehensive statement of underlying facts upon which the magistrate can make an independent determination that the informant is credible or his information reliable. *People v. Aragon*, 187 Colo. 206, 529 P.2d 644 (1974).

And merely stating informant known to be reliable does not establish his credibility. An affidavit does not establish the credibility of an informant by merely stating that the informant is known to be reliable, nor does an affidavit establish the credibility of an informant by merely stating that the informant is known to be reliable based on "past information" supplied by the informer which has proved to be accu-

rate. Although the words "past information" might conjure up in the mind of the officer some knowledge of the underlying circumstances from which the officer might conclude that the informant is reliable, the judge has not been apprised of such facts, and consequently, he cannot make a disinterested determination based upon such facts. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

As a basis for issuing a search warrant, the mere assertion of reliability is not sufficient to establish an informant's credibility. *People v. Aragon*, 187 Colo. 206, 529 P.2d 644 (1974).

An affidavit for a search warrant seeking to show an informant's credibility is not satisfactory by merely stating that the informant is reliable, or that he has supplied information in the past which proved to be accurate. Nor are irrelevant, albeit correct, details sufficient. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

Where the only recital in the affidavit for a search warrant bearing upon the informant's credibility or the reliability of the information supplied was as follows: "That the confidential informant has related information to the affiant regarding several previous narcotics and dangerous drugs sellers and users which has been confirmed and proven reliable by the affiant", this was totally conclusory and devoid of details sufficient to support an independent finding of credibility or reliability. *People v. Bowen*, 189 Colo. 126, 538 P.2d 1336 (1975).

Neither does allegation of suspect's criminal reputation. An allegation of suspect's criminal reputation standing alone does not set forth sufficient facts to allow a magistrate to determine independently reliability of information supplied by an informant. *People v. Peschong*, 181 Colo. 29, 506 P.2d 1232 (1973).

But three ways to allow magistrate to determine reliability of informant's information. There are at least three ways in which an affidavit might allow a magistrate to determine the reliability of an informant's information so as to issue a search warrant: (1) By stating that the informant had previously given reliable information; (2) by presenting the information in detail which clearly manifests its reliability; and (3) by presenting facts which corroborate the informant's information. *People v. Masson*, 185 Colo. 65, 521 P.2d 1246 (1974).

Reliability of informant. Where an affidavit is based upon an informer's tip, the totality of the circumstances inquiry looks to all indicia of reliability, including the informer's veracity, the basis of his knowledge, the amount of detail provided by the informer, and whether the information provided was current. *People v. Leftwich*, 869 P.2d 1260 (Colo. 1994); *People v. Randolph*, 4 P.3d 477 (Colo. 2000); *People v. Pacheco*, 175 P.3d 91 (Colo. 2006).

Assertion that informant previously furnished solid information of criminal activity shows his credibility. The requirement that the affiant-police officer support his request for a search warrant with information showing that the informant was credible, or his information was reliable, may be satisfied by an assertion that the informant has previously furnished solid material information of specified criminal activity. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

Previously furnished information leading to arrests sufficient to find informant reliable. Where the affidavit related that the informant had, within the past 14 months, supplied information which led to the arrest and conviction of an individual for possession of a narcotic drug, and that the informant had, within the past 24 hours, supplied information which resulted in arrests and the seizure of a quantity of marijuana, this information was sufficient to permit the issuing magistrate to find that the informant was reliable. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

Where the affidavit states that the informant has "given information in the past that has resulted in seizures and arrests" and that the informant "reported that he has just left this location and observed the described articles", then a fair reading of these statements compels one to conclude that the informant is personally aware of the location and the identity of the articles and additional details, such as the name of the person who led the informant to the location of the articles; these constitute examples of that type of essential information that allows the judge who issues the warrant to determine the underlying circumstances from which the officer who signs the affidavit concluded that these articles are on the premises. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970).

Where informant had furnished information which "has been the cause of approximately 20 narcotic and dangerous drug arrests in the past year", the magistrate could independently conclude that the police would not repeatedly accept information from one who has not proven by experience to be reliable, and hence, the magistrate could determine that the informant was credible. *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973).

Additionally, reliability of informant can be corroborated by descriptions in police reports. Where defendant contends that an affidavit does not contain sufficient corroborative information as to reliability of informant, such is without merit when the similarity of descriptions given by the informant, as well as by police employee, of articles matches descriptions contained in police (e.g., theft) reports; this is sufficient independent proof of reliability of informant, and employee, and constitutes

sufficient probable cause for issuance of a warrant. *People v. Greathouse*, 173 Colo. 103, 476 P.2d 259 (1970).

Citizen-informer not considered on same basis as ordinary informant. Colorado follows the citizen-informer rule and will recognize that a citizen who is identified by name and address and was a witness to criminal activity cannot be considered on the same basis as the ordinary informant. *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711 (1971).

And not necessary that affidavit contains facts showing reliability of citizen-informer. Where the citizen-informer rule applies to information contained in an affidavit for issuance of a search warrant, it is not necessary that the affidavit contain a statement of facts showing the reliability of the citizen-informer, as is the case when the informant is confidential and unidentified. *People v. Schamber*, 182 Colo. 355, 513 P.2d 205 (1973).

Totality of circumstances test adopted. *People v. Pannebaker*, 714 P.2d 904 (Colo. 1986).

VI. ISSUANCE, CONTENTS, EXECUTION, AND RETURN.

A. Issuance and Contents.

Affidavit must support finding of probable cause as to each warrant issued. While more than one search warrant may be issued on the basis of a single affidavit, the affidavit must support a finding of probable cause as to each separate warrant or each separate place to be searched. *People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973).

Search warrant should not be broader than the justifying basis of facts. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

Description sufficient where person presented with warrant knows place authorized to be searched. The description in a warrant is sufficient where any person, upon being presented with the warrant, would know immediately in which place the search is authorized. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970).

And number of place searched not required where location specifically indicated. It is unrealistic to require the technicality of indicating the number of the place to be searched when the location is otherwise indicated with reasonable specificity. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970).

Warrant describing house as within Denver when in fact the house lay one-half block outside Denver was not for that reason invalid. *People v. Martinez*, 898 P.2d 28 (Colo. 1995).

Illicit property may be described generally. If the purpose of search is to seize not a

specific property but any property of a specified character which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary, and it may be described generally as to its nature or character. *People v. Benson*, 176 Colo. 421, 490 P.2d 1287 (1971).

Such as "a quantity of narcotic drugs". Where the affidavit contains information which justifies the magistrate in believing that upon a search of the particular premises not only marijuana but other narcotics might be found, a warrant describing "a quantity of narcotic drugs" is in order. *People v. Benson*, 176 Colo. 421, 490 P.2d 1287 (1971).

Historically, problem has arisen in execution of warrant at night. Historically, there has not been a question about executing a search warrant during the daytime; the problem has arisen in the execution of a warrant at night when the warrant did not specifically so authorize such execution. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Thus, under rule, warrant without specified time may be executed in daytime. Under this rule, when a search warrant does not specify the time at which it is to be served, or that it may be served at any time, its validity is not affected, and it may be executed in the daytime. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Or at any time. Unless and until a warrant specifically indicates that it must be served in the daytime, it may be served at any time. *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

Language sufficient to identify affiant. *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

B. Execution and Return.

The fourth amendment generally requires officers to knock before executing a search warrant except when the warrant specifically authorizes a "no-knock" or the particular facts and circumstances known to them at the time the warrant is executed adequately justify dispensing with the requirement to knock. In this case the officers had reasonable suspicion that knocking would result in destruction of the drugs subject to seizure. *People v. King*, __ P.3d __ (Colo. App. 2011).

Execution means searching premises authorized to be searched in warrant. The execution of a search warrant means carrying out the judicial command of the warrant to conduct a search of the premises authorized to be searched. *Mayorga v. People*, 178 Colo. 106, 496 P.2d 304 (1972).

Warrant directed to "authorized" officers sufficient, as name of specific officer not required. The contention that a search warrant

which directs "all sheriffs and peace officers" is improperly directed and should be specifically directed to officers in a certain county is without merit where it is implicit after considering all the language of the warrant that its direction or command is to officers in a certain county and that in this respect it complies with section (d). *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

A search warrant addressed to "any person authorized by law to execute warrants within the state of Colorado" complies with the provisions of this rule and is not deemed insufficient merely because it does not contain the name of the officer who would execute it. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Rule's requirements relating to making of return and inventory are ministerial in nature. *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970).

And the failure to make a proper return can always be corrected at a later time in the proceedings. Deficiencies, if any exist in the return, can always be corrected by order of court. *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970).

Technical perfection not required. Where warrant specified a street address that was adjacent to defendant's residence and owned by the same owner, and defendant's residence was not itself searched, both the warrant and the search were valid. *People v. Schrader*, 898 P.2d 33 (Colo. 1995).

Not every violation of subsection (c)(1) of this rule requires suppression of evidence under the exclusionary rule. Where search warrant was executed one-half block outside officers' jurisdiction, but city boundaries were not clear and officers promptly notified the proper authorities when the error was discovered, no violation of defendant's constitutional rights occurred. *People v. Martinez*, 898 P.2d 28 (Colo. 1995).

VII. MOTION TO SUPPRESS EVIDENCE.

A. In General.

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., part 3 of article 3 of title 16, and Crim. P. 26.

Previously, evidence obtained in unlawful search was admissible in criminal prosecution. Until June 19, 1961, when the supreme court of the United States decided *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the rule in Colorado was that evidence, even though obtained as a result of an unlawful search and seizure, was admissible in a prosecution for a criminal offense. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

But now is inadmissible. The fruits of an unlawful search are, by *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and by this rule, inadmissible in evidence. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

This rule specifically provides for motion to suppress. A motion to suppress is excluded by definition from Crim. P. 12(b), but section (e) of this rule specifically provides for such a motion. *Adargo v. People*, 173 Colo. 323, 478 P.2d 308 (1970).

Only purpose served by suppressing evidence is preventing use by prosecution. The only purpose that can be served by suppressing the evidence which is seized by the police is to prevent its use by the prosecution at the trial. *Lucero v. People*, 164 Colo. 247, 434 P.2d 128 (1967).

Habeas corpus is not correct vehicle to raise the issue of illegal evidence having been secured through wiretapping. *Ferrell v. Vogt*, 161 Colo. 549, 423 P.2d 844 (1967).

Not every violation of subsection (c)(1) of this rule requires suppression of evidence under the exclusionary rule. Where search warrant was executed one-half block outside officers' jurisdiction, but city boundaries were not clear and officers promptly notified the proper authorities when the error was discovered, no violation of defendant's constitutional rights occurred. *People v. Martinez*, 898 P.2d 28 (Colo. 1995).

Trial court erred in holding that defendant abandoned the motions to suppress when he failed to appear at the suppression hearings. The court could have heard and decided the motions on the merits though defendant was absent. *People v. Dashner*, 77 P.3d 787 (Colo. App. 2003).

Defendant's incriminating statements were obtained in violation of his Miranda rights, and trial court's order to suppress the statements was appropriate. A reasonable person in defendant's circumstances would have felt deprived of his or her freedom of action in a manner similar to a formal arrest. Therefore, defendant was in custody and subject to interrogation without being advised of his Miranda rights. *People v. Holt*, 233 P.3d 1194 (Colo. 2010).

B. Aggrieved Party.

Defendant has the burden of showing that he is an aggrieved person under the provisions of this rule. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

And where burden not established, motion denied. Where the defendant does not meet his burden and does not establish that he has standing to object to the search and seizure, his

motion to suppress is properly denied. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

Prosecutor bears no burden at suppression hearing to prove that defendant was the victim of the claimed illegal police conduct because, when a defendant files a motion to suppress claiming his or her fourth amendment rights were violated, this initial allegation suffices to establish that he or she was the victim or aggrieved party of the alleged invasion of privacy. *People v. Jorlantin*, 196 P.3d 258 (Colo. 2008).

Defendant legitimately on premises when search occurs possesses standing to object. A defendant has standing to object to a search or to a seizure if he is legitimately on the premises when the search occurs. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

When fruits of search to be used against him. Anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. *Lanford v. People*, 176 Colo. 109, 489 P.2d 210 (1971).

Including a child subject to delinquency adjudication. Since a child subject to a delinquency adjudication is entitled to same constitutional safeguards as adult accused of crime, evidence obtained as result of unlawful search should be suppressed. In re *People in Interest of B.M.C.*, 32 Colo. App. 79, 506 P.2d 409 (1973).

Hence, defendant "aggrieved" where search occurs in sister's home while defendant there. Where the search and seizure which a defendant challenges occurred in the home of his sister and the defendant was there with the permission of his sister, the defendant qualifies under this rule as a person "aggrieved", where the search, if valid, produces evidence which is relevant to the issue of his guilt, for under the circumstances, he has standing to have the question of the validity of the search determined upon its merits. *Adargo v. People*, 173 Colo. 323, 478 P.2d 308 (1970).

One not legitimately on the premises has no standing to move to suppress the fruits of a search and seizure of those premises. *People v. Trusty*, 183 Colo. 291, 516 P.2d 423 (1973).

And defendant cannot urge standing on basis of fleeting presence before search. Where a defendant neither claims nor has a possessory interest in premises and has no personal expectation of privacy, he cannot successfully urge standing on the basis of his fleeting presence in the premises before the search. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

State precluded from denying defendant's possessory interest when possession essential element of offense. When possession of the seized evidence is itself an essential element of the offense charged, the state is precluded from denying that the defendant has the requisite

possessory interest to challenge the admission of the evidence. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

Defendant did not have automatic standing to challenge automobile search. Where the defendant was found unconscious inside an automobile which upon a search was found to contain the deceased's body, and it was not an instance where the basis for defendant's prosecution was possession of the vehicle, the defendant did not have automatic standing to challenge the vehicle's search and seizure. *People v. Trusty*, 183 Colo. 291, 516 P.2d 423 (1973).

Likewise, where defendant has abandoned a car, he has no standing to suppress the evidence seized in a warrantless search of the car as "a person aggrieved". *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

A person who has abandoned a vehicle is not an "aggrieved" person under section (e) and has no standing to suppress evidence seized in a search of that vehicle. *People v. Parker*, 189 Colo. 370, 541 P.2d 74 (1975).

Jail not place where defendant can claim constitutional immunity from search. A public jail is not the equivalent of a man's "house" or a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects. A jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. *Moore v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

C. Grounds.

1. In General.

Motion has limited reach. A brief examination of the five grounds that support a motion to suppress discloses the limited reach of the motion. *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971).

A court cannot exclude all of a witness's testimony based on a violation of the constitution. The court has the authority to suppress only the tainted evidence, not the untainted evidence. *People v. Cowart*, 244 P.3d 1199 (Colo. 2010).

Entrapment does not present a question of admissibility of evidence, but presents rather the proposition that a conviction may not be obtained, no matter what the evidence, where the authorities instigated the acts complained of, and this is generally a question of fact for a jury; therefore, entrapment is not within the scope of section (e) of this rule, which deals solely with the question of admissibility. *People v. Patterson*, 175 Colo. 19, 485 P.2d 494 (1971).

Absence of "chain of evidence" not within rule's perimeters. When the defendant argues that there is no "chain of evidence" to establish

that a specimen analyzed is one obtained from the defendant, then, in the absence of any averment of constitutional overtones for this claim, this ground does not fall within the perimeters set forth in section (e) of this rule, and to which interlocutory appeals are limited. *People v. Kokesh*, 175 Colo. 206, 486 P.2d 429 (1971).

Where no constitutional rights invaded under official authority, motion denied. Where no constitutional rights are invaded by or under color of official authority, a motion to suppress will be denied. *People v. Benson*, 176 Colo. 421, 490 P.2d 1287 (1971).

Rule not expanded to exclude evidence obtained by private persons. Even though the rule as to the exclusion of evidence obtained by an unreasonable search and seizure has been broadened and expanded, it has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officials must be excluded. *People v. Benson*, 176 Colo. 421, 490 P.2d 1287 (1971).

But question whether items seized inadmissible on other grounds determined at trial. The question of whether the items seized are inadmissible in evidence on grounds other than those specified in this rule must be determined at the time of trial. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

Rule applicable to evaluate validity of arrest prior to search. This rule does apply when the validity of an arrest must be evaluated before the court can rule upon a motion to suppress items seized in a search incident to the arrest. *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979).

Evidence need not be suppressed if it is obtained in violation of a statutory provision unless it also amounts to a constitutional violation. *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999).

Police search of cloth glove not unconstitutional. Like the plain view doctrine, the plain feel doctrine allows police to seize contraband discovered through the sense of touch during an otherwise lawful search; therefore, trial court erred in suppressing evidence. *People v. Brant*, 252 P.3d 459 (Colo. 2011).

Where search warrant validly is obtained, motion to suppress evidence is not valid. *People v. Buttorff*, 179 Colo. 406, 500 P.2d 979 (1972).

Preservation of hazardous substances not required. The destruction of evidence rule cannot be applied mechanically in a way that endangers the lives of public safety officers or forces the police to preserve hazardous substances which cannot be stored safely. *People v. Clements*, 661 P.2d 267 (Colo. 1983).

Such as high explosives. The prosecution does not have the duty to preserve high explosives, homemade bombs or dangerous materials if that requirement would endanger lives and

the public safety. *People v. Clements*, 661 P.2d 267 (Colo. 1983).

Failure for good cause to comply with subsection (c)(1) of this rule, which requires affidavits for search warrants to be sworn to or affirmed before the issuing judge, does not constitute a constitutional violation that automatically triggers the exclusionary rule. *People v. Fournier*, 793 P.2d 1176 (Colo. 1990).

2. Illegal Seizure Without Warrant.

Not every search that is conducted without search warrant is "unreasonable" or "illegal" as those words are used in the United States Constitution and in this rule. *More v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

Nor does Mapp decision exclude all evidence incident to arrest without warrant. The decision of the supreme court of the United States in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), went no further than to exclude in state courts the use of evidence obtained by unreasonable search and seizure prohibited by the fourth amendment; it does not exclude all evidence which might be obtained as an incident to a lawful arrest, nor does it preclude admission of all evidence which may have been obtained without the sanction of a search warrant. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

But probable cause requirements are at least as strict in warrantless searches as in those pursuant to a warrant. *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974).

Where search illegal at inception, nothing intervening can render search legal. Where a search is illegal at its inception, nothing intervening, including the last minute obtaining of a search warrant, can render any part of the search legal. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

But where warrantless entry and arrest legal, evidence seized not inadmissible. Where warrantless entry and arrest are based on probable cause and a search warrant is issued subsequent to the entry and arrest, the evidence seized is not inadmissible because the entry and arrest were without warrant. *People v. Vaughns*, 175 Colo. 369, 489 P.2d 591 (1971).

Except where supposed legitimate entry utterly vitiated by method of entry. Where any supposed legitimate entry is utterly vitiated by the method of entry, the evidence observed by the officers is tainted, cannot be used as the basis for probable cause to arrest or seized as incident to a lawful arrest, and is therefore properly suppressed. *People v. Godinas*, 176 Colo. 391, 490 P.2d 945 (1971).

Warrant needed where article believed concealed. A belief, no matter how well-founded, that an article sought is concealed in a dwelling furnishes no justification for the search

of the dwelling without a lawful warrant. *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972).

Defendant's allegedly criminal acts were sufficiently attenuated from any illegal conduct of sheriff's deputies so that exclusion of evidence was not appropriate. Evidence of a new crime committed in response to an unlawful trespass is admissible. *People v. Doke*, 171 P.3d 237 (Colo. 2007).

"Emergency doctrine" tested on particular facts of each case. In applying the "emergency doctrine" to warrantless searches each case must be tested on its own particular facts. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

And the test is reasonableness under the circumstances. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

But odor of decomposing body not emergency. The detection of an odor which might be that of a decomposing body does not create, in and of itself, an emergency sufficient to justify a warrantless search. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

Burden of proving probable cause for arrest without warrant is on the prosecution. *People v. Chacon*, 177 Colo. 368, 494 P.2d 79 (1972).

As is burden to establish probable cause for warrantless search. The burden is upon the state at a suppression hearing to establish that probable cause existed which would justify a warrantless search of the defendant's person. *People v. Ware*, 174 Colo. 419, 484 P.2d 103 (1971).

Burden of proof for warrantless arrest and search. Where defendant is arrested without a warrant and moves to suppress evidence seized in course of his arrest, burden of proof is upon prosecution to prove constitutional validity of arrest and search. *People v. Crow*, 789 P.2d 1104 (Colo. 1990).

"Reasonable" search may be made in the place where a lawful arrest occurs in order to find and seize articles connected with the crime as its fruits or as the means by which it was committed. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

And police entitled to make contemporaneous search of person. When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit a crime. *People v. Vigil*, 175 Colo. 421, 489 P.2d 593 (1971).

And such searches not violative of constitutions. Even if there is a search, where the arrest is legal the search is not violative of the state and federal constitutions regarding unreasonable search and seizure. *People v. Clark*, 173 Colo. 129, 476 P.2d 564 (1970).

So long as not too much time between search and arrest. The lapse of too much time between the inception of the search and the arrest falls short of the requirement that the two acts (search and arrest) be nearly simultaneous and constitute for all practical purposes one transaction. *People v. Drumright*, 172 Colo. 577, 475 P.2d 329 (1970).

Search incident to arrest limited to evidence related to offense. The scope of a warrantless evidentiary search incident to arrest is limited to evidence related to offense for which arrest is made. In re *People in Interest of B. M. C.*, 32 Colo. App. 79, 506 P.2d 409 (1973).

And extends to things under accused's immediate control and place of arrest. The right to search and seize without a search warrant incident to a lawful arrest extends to things under the accused's immediate control and to an extent, depending on the circumstances of the case, to the place where he is arrested. *People v. Vigil*, 175 Colo. 421, 489 P.2d 593 (1971).

Including police station. A police station, immediately following an arrest, cannot be held to be too remote from the place of arrest in a search and seizure case. *Glass v. People*, 177 Colo. 267, 493 P.2d 1347 (1972).

Search following arrest may also be conducted as inventory procedure. A warrantless search of defendant's purse that followed her arrest for drug use and the seizure of the contraband found therein may be upheld either as a search incident to an arrest or as an inventory procedure conducted prior to incarceration. *Avalos v. People*, 179 Colo. 88, 498 P.2d 1141 (1972).

Where probable cause for a warrantless arrest is lacking, subsequent search is invalid. *People v. Trujillo*, 179 Colo. 428, 500 P.2d 1176 (1972).

And fact contraband found in search does not make arrest valid. Where police officers when they arrest a defendant have no idea of what the charge is for which they are arresting him, the fact that contraband is found in an illegal search does not make such an arrest valid. *Gallegos v. People*, 157 Colo. 173, 401 P.2d 613 (1965).

Fruits of unlawful arrest inadmissible. The prosecution's failure to present evidence to support a determination that the arrest of the defendant was supported by probable cause leaves the court with no alternative but to hold that the arrest was unlawful and its fruits inadmissible. *People v. Chacon*, 177 Colo. 368, 494 P.2d 79 (1972).

And the defendant's motion to suppress should be granted where the police conducted a warrantless search and arrest without probable cause. *People v. Henderson*, 175 Colo. 400, 487 P.2d 1108 (1971).

Test of admissibility of evidence seized in lawful search following unlawful search is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been arrived at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. *People v. Hannah*, 183 Colo. 9, 514 P.2d 320 (1973).

"Pat down" or "stop and frisk" search justified for potentially armed individual. It is well established that an officer may conduct a limited search for weapons (a so-called "pat down" or "stop and frisk") for his own safety when he is justified in believing that he is dealing with a potentially armed and dangerous individual. *Finley v. People*, 176 Colo. 1, 488 P.2d 883 (1971).

Limited searches of person for weapons during investigative detention, where probable cause for arrest is lacking, is permissible, but there must be: (a) Some reason for the officer to confront the citizen in the first place; (b) something in the circumstances, including the citizen's reaction to the confrontation, must give the officer reason to suspect that the citizen may be armed and, thus, dangerous to the officer or others; and (c) the search must be limited to a frisk directed at discovery and appropriation of weapons and not at evidence in general. *People v. Martineau*, 185 Colo. 194, 523 P.2d 126 (1974).

And evidence of crime uncovered is competent and admissible. Where the search was limited to a frisk directed at the discovery and appropriation of weapons, and not to uncover evidence as such, evidence of a crime having thus been lawfully uncovered, it is competent and admissible in evidence as relevant proof of the charges of which defendant is accused. *People v. Martineau*, 185 Colo. 194, 523 P.2d 126 (1974).

Objects in plain view of officer subject to seizure. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972).

Where the record fails to support defendant's contention that the officers were engaged in a search when they observed the evidence in plain view, suppression is not required. *Blincoe v. People*, 178 Colo. 34, 494 P.2d 1285 (1972).

As such does not constitute a search. The discovery of the fruits of a crime or of contraband lying free in the open does not constitute any kind of search. *Alire v. People*, 157 Colo. 103, 402 P.2d 610 (1965).

Police protective search of passenger compartment of vehicle justified. *People v. Brant*, 252 P.3d 459 (Colo. 2011).

Applying the "plain feel" doctrine, police properly seized evidence discovered in cloth

glove. *People v. Brant*, 252 P.3d 459 (Colo. 2011).

Validity of automobile searches turn upon their own peculiar circumstances. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Police officer entitled to approach suspicious parked automobile and look inside. Where a police officer approaches a parked automobile, in which the defendant is seated, he has a right to flash his light inside, and any contraband which he sees in the automobile and seizes is admissible against the defendant. *People v. Shriver*, 186 Colo. 405, 528 P.2d 242 (1974).

Plain view exception applies to contraband in defendant's home observed by officers using a flashlight to view inside defendant's residence. Officers who were lawfully on defendant's porch when defendant left front door open could use flashlights to peer into the home. The fact that the officers used their flashlights to see inside defendant's home did not transform their plain view observations into an illegal search because, had it been daylight, the contraband on the table inside the home would have been plainly visible to the officers. *People v. Glick*, 250 P.3d 578 (Colo. 2011).

Lawful to stop vehicle for investigatory purposes, and search where probable cause. Where police officer obtained probable cause to search a vehicle and seize evidence in the process of making a lawful stop for threshold investigatory purposes, the defendant's motion to suppress this evidence was properly denied. *People v. Lucero*, 182 Colo. 39, 511 P.2d 468 (1973).

Stopping automobile not "unreasonable" where probable cause offense committed. Stopping an automobile and conducting a search and seizure is not "unreasonable" where the officer conducting it has a probable and reasonable belief that an offense has been committed. *Hopper v. People*, 152 Colo. 405, 382 P.2d 540 (1963).

If probable cause to search car, right to search without warrant. If there is probable cause to obtain a warrant to search a car, police officers have the right to stop and search it without a warrant. *People v. Chavez*, 175 Colo. 25, 485 P.2d 708 (1971).

And items found admissible into evidence. Where police officers have probable cause to search defendants' automobile, the search of defendants' automobile without a warrant is proper, and it is not error to admit the items found into evidence. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Search of vehicle which is made substantially contemporaneously with an arrest is permissible as an incident to the arrest. *People v. Olson*, 175 Colo. 140, 485 P.2d 891 (1971).

And evidence seized during arrest not suppressed. The denial of a motion to suppress

evidence seized during a warrantless arrest of fleeing felons in an automobile should be affirmed. *People v. Duncan*, 179 Colo. 253, 500 P.2d 137 (1972).

Where defendant stopped for careless driving, exposed contraband seized. The fact that a defendant is stopped by police officers because of his careless driving will not prevent them from seizing contraband found lying exposed on the seat of the automobile. *Alire v. People*, 157 Colo. 103, 402 P.2d 610 (1965).

As inspection protected by "plain view rule". Where a police officer properly stops a car for careless driving, that officer has every right to look into the car and seize anything that is contraband, for such an inspection is held to be protected by the "plain view rule". *People v. Teague*, 173 Colo. 120, 476 P.2d 751 (1970).

And items in "plain view" admissible in evidence. Where an arrest is made with probable cause, any items in "plain view" after the defendant exits from a vehicle can properly be used in evidence against him. *People v. Clark*, 173 Colo. 129, 476 P.2d 564 (1970).

Probable cause must exist at moment arrest or automobile search made. In order for a warrantless search of an automobile to be excused under exigent circumstances, probable cause must exist at the moment the arrest or the search is made. *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974).

Factors which lead to the conclusion that a warrantless search of a car was reasonable include the commission of a felony, abandonment of the car by the suspects at the scene of the crime, and their flight from the scene on foot into the night and their remaining at large. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Suspicious demeanor and odor supports probable cause for possession of marijuana in car. The combination of the suspicious demeanor of the occupants of a vehicle and the subsequent odor of marijuana emanating from within the car moments after the occupants had exited was a sufficient basis upon which to predicate probable cause for the belief that the offense of possession of marijuana had been recently committed. *People v. Olson*, 175 Colo. 140, 485 P.2d 891 (1971).

Moreover, it is unnecessary for officer to have a chemical analysis of a suspected narcotic prior to making a valid seizure; it is only necessary that he have reason to believe that the article seized is a narcotic. *Alire v. People*, 157 Colo. 103, 402 P.2d 610 (1965).

But mere exploratory search not sustained. Where a police officer has no cause to believe that a car contains any contraband, a search is exploratory only and cannot be sustained. *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

Search not incident to arrest where defendant in custody, car outside search area. The defendant was in custody so there was no danger of his destroying any evidence in his car, and the car was without the area authorized to be searched by a warrant, the search was not incident to the arrest. *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

Suppression of evidence proper where it was undisputed that defendant had already been arrested, handcuffed, and placed in patrol car at the time of the search of defendant's vehicle and because it would not have been reasonable for officers to believe that defendant's vehicle might contain evidence relevant to the false reporting crime. *People v. Chamberlain*, 229 P.3d 1054 (Colo. 2010).

Permissive search is not unreasonable search and seizure within the coverage of *Mapp v. Ohio* (367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)). *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

Hence, a search loses its illegal effect when defendant gives permission for such a search of the premises, as this consent removes the applicability of the constitutional guaranty. *Williams v. People*, 136 Colo. 164, 315 P.2d 189 (1957); *Hopper v. People*, 152 Colo. 405, 382 P.2d 540 (1963).

But search must be voluntary. A search conducted without a warrant but with the voluntary consent of the person whose place is searched is reasonable and not in violation of the state or federal constitutions. *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969).

And voluntary means that the consent is intelligently and freely given. *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969).

Burden of proof as to consent to warrantless search on people. The burden of proof in the determination of whether a consent to a warrantless search is intelligently and freely given rests firmly on the people. *People v. Neyra*, 189 Colo. 367, 540 P.2d 1077 (1975).

Whether consent voluntary determined from each case's total circumstances. Whether or not the consent which is given to a search in a particular case is voluntary is a question to be determined from the totality of the circumstances in each case. The circumstances of a case may indicate that a defendant was fully aware that the police were his adversaries and that evidence seized by them could be used against him at trial. *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969).

Miranda decision not applicable to fourth amendment searches and seizures. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), has no application to the area of fourth amendment searches and seizures, since the ruling therein was designed as a prophylactic rule to correct and prevent abusive police practices in the area

of confessions, and the United States Supreme Court has not acted to extend the rule in *Miranda* to the fourth amendment. *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969).

But warning that defendant does not have to consent to search constitutionally sufficient. Where a defendant is informed that he does not have to consent to a warrantless search of his premises, such a warning is sufficient to apprise the defendant of his rights under the fourth amendment of the U. S. Constitution and § 7 of art. II, Colo. Const. *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969).

Resident of a place has the ability to consent to a search of the premises, and a search based on such consent is not illegal. *Lanford v. People*, 176 Colo. 109, 489 P.2d 210 (1971).

Likewise, one of two or more persons occupying premises may authorize search. When two or more persons have an equal right of ownership, occupancy, or other possessory interest in the premises searched or the property seized, any one of such persons may authorize a search and seizure thereof thereby binding the others, waiving their rights to object. *Lanford v. People*, 176 Colo. 109, 489 P.2d 210 (1971).

But a landlord is not a proper person to give consent to the search of his tenant's residence. *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971).

After consent has been granted to conduct search, that consent cannot be withdrawn. *People v. Kennard*, 175 Colo. 479, 488 P.2d 563 (1971).

Prisoner cannot expect to be free from warrantless searches. A prison cell is not a place in which the occupant can expect to be free from all searches unless accompanied by a warrant. *Moore v. People*, 171 Colo. 338, 467 P.2d 50 (1970).

3. Warrant Insufficient on Face.

Affidavits have not been required to be attached to warrants. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970).

Warrant not insufficient because affidavit does not allege possession of articles is crime. Where an affidavit upon which a search warrant is issued does not allege that possession of the articles in question is a crime, this does not render the warrant insufficient. *People v. Whisenhunt*, 173 Colo. 109, 476 P.2d 997 (1970).

The fact that the affidavit details activities that are lawful does not cause it to be a bare bones affidavit; a combination of otherwise lawful circumstances may well lead to a legitimate inference of criminal activity. *People v. Altman*, 960 P.2d 1164 (Colo. 1998).

But, constitutionally, probable cause must appear on face of affidavit. The express Colorado constitutional requirement of a written

oath or affirmation makes it clear beyond a doubt that sufficient facts to support a magistrate's determination of probable cause must appear on the face of a written affidavit. *People v. Baird*, 172 Colo. 112, 470 P.2d 20 (1970).

Otherwise, warrants issued on such fatally defective affidavits are nullities, any search conducted under them was unlawful, and the fruits of such a search are inadmissible in evidence. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *People v. Baird*, 173 Colo. 112, 470 P.2d 20 (1970); *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavit in support of warrant held fatally defective. *People v. Peschong*, 181 Colo. 29, 506 P.2d 1232 (1973).

On review, search warrants are tested and interpreted in common sense and realistic fashion. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Where statements concerning reliability of informer are not true, warrant cannot stand. Where information attributed to an informer is sufficient upon which to base a warrant, but statements made to the issuing magistrate by a policeman concerning the reliability of the informer are not true, a search warrant issued by the magistrate based on the false allegations of the police officer cannot stand. *People v. Massey*, 178 Colo. 141, 495 P.2d 1141 (1972).

Warrant's validity cannot be challenged where modified before issuance. Where changes and modifications on a search warrant take place before it is signed and issued by a judge, the validity of the search warrant is not subject to challenge. *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

Warrant not invalidated because descriptions therein vary from affidavit's. That there exists a variation between the descriptions in the warrant and in the affidavit does not in itself render the warrant invalid, unless the variance is material. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970).

So long as description adequately identifies premises. A slight variation from the description in the affidavit will not affect the validity of a search warrant as long as the remainder of the descriptive language adequately identifies the premises to be searched. *People v. Peppers*, 172 Colo. 556, 475 P.2d 337 (1970).

And warrant specifically describing premises not rendered insufficient by command portion of warrant. A command portion of search warrant which reads: "You are therefore commanded to search forthwith the above described property for the property described" did not render the warrant insufficient on its face where the property to be searched had been specifically described "above" in the warrant. *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974).

Test for determining whether the sufficiency of a description in a search warrant is adequate is if the officer executing the warrant can with reasonable effort ascertain and identify the place intended to be searched. *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974).

Where city not specified in warrant, absence not fatal where location clear. Where a warrant specified the place to be searched as to street, county, and state, although not as to city, but the district attorney made a showing to the trial court that the place searched was the only one in the indicated county having such a street address, and the trial court found that there was sufficient clarity as to the location in the minds of all parties involved, then the absence of the name of the city was not fatal or prejudicial. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970).

But omission of description of property to be seized not excused. Where in the space provided in a warrant for the description of the property to be seized there appears a description of the location of the place to be searched, then, although it may be presumed that this incorrect language doubtless was inserted by mistake and that the person who completed the warrant intended to insert the required description of the property to be seized, this is, however, not the type of mere "technical omission" that is excused, since it goes rather to the very essence of the constitutional requirement that a warrant describe "the person or thing to be seized, as near as may be" contained in § 7 of art. II, Colo. Const. *People v. Drumright*, 172 Colo. 577, 475 P.2d 329 (1970).

Warrant commanding officers to enter designated place for certain property valid. A search warrant directed to all peace officers which in essence states that certain articles are concealed at a designated address, that complaint made by a named person set forth reasons which show that probable cause exists, and commands such persons to enter the place and search for certain property fully sets forth the information required by this rule, and is therefore valid. *People v. Ferris*, 173 Colo. 494, 480 P.2d 552 (1971).

Failure to insert names indicating to whom return to be made is ministerial deficiency. The failure to insert names in blank spaces provided in a search warrant for purpose of indicating to whom return is to be made and to whom written inventory of seized property is to be made is ministerial deficiency and not such as to render a warrant invalid. *Brown v. People*, 158 Colo. 561, 408 P.2d 981 (1965).

Substantial compliance with contemporary objection rule exists where continuous general objection is made on ground that evidence is product of search under invalid warrant. *Brown v. Patterson*, 275 F. Supp. 629 (D.

Colo. 1967), *aff'd*, 393 F.2d 733 (10th Cir. 1968).

But even if objection insufficient, federal habeas relief not precluded. Even if failure to specifically attack insufficiency of affidavit supporting warrant renders objection insufficient under this rule, a state court conviction based thereon will not preclude procuring federal habeas corpus relief. *Brown v. Patterson*, 275 F. Supp. 629 (D. Colo. 1967), *aff'd*, 393 F.2d 733 (10th Cir. 1968).

4. Property Not Described in Warrant.

Description of items to be seized in search warrant must be specific. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

And items seized under warrant with insufficient description suppressed. All items seized under a search warrant that failed to describe the things to be seized with sufficient particularity should be suppressed. *People ex rel. McKevitt v. Harvey*, 176 Colo. 447, 491 P.2d 563 (1971).

But the seizure of property not specified does not render specified items inadmissible. *People v. Greathouse*, 173 Colo. 103, 476 P.2d 259 (1970).

Warrant not too broad where authorizes seizure of "narcotics" and "paraphernalia". The language in a warrant which specifies the items to be seized is not so broad and ambiguous as to make it a general warrant where the warrant authorizes seizure of: (1) Any and all narcotics and dangerous drugs as defined by the applicable Colorado statutes, the possession of which is illegal; and (2) all implements, paraphernalia, articles, papers, and records pertaining to, or which would be evidence of, the illegal use, possession, or sale of narcotics and/or dangerous drugs. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970).

And "narcotics" includes marijuana. Where a search warrant authorizes a search for "narcotics, dangerous drugs, and narcotics paraphernalia", then, since the word "narcotics" includes marijuana, the seizure of marijuana is properly authorized under the warrant. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Term "narcotics paraphernalia" is not so vague as to make document general warrant. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Seized items held sufficiently within warrant description. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Search must be conducted for specific articles. The search, whether under a valid search warrant or whether as incident to a lawful arrest, must be one in which the officers are looking for specific articles and must be conducted in a manner reasonably calculated to uncover

such articles. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *People v. Drumright*, 172 Colo. 577, 475 P.2d 329 (1970).

And any search more extensive than this constitutes a general exploratory search and is squarely within the interdiction of the constitutional guarantee against unreasonable search and seizure. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963); *People v. Drumright*, 172 Colo. 577, 475 P.2d 329 (1970); *In re People in Interest of B.M.C.*, 32 Colo. App. 79, 506 P.2d 409 (1972).

Entire search only becomes invalid if general tenor is that of exploratory search for evidence not specifically related to the search warrant. *People v. Tucci*, 179 Colo. 373, 500 P.2d 815 (1972).

And where execution of warrant in good faith, not all evidence obtained suppressed. Where evidence is without conflict that the persons executing the search warrant were trying in good faith to obtain items relating to that prescribed in the warrant, a ruling requiring suppression of all evidence obtained during the search of defendant's premises is disapproved. *People v. Tucci*, 179 Colo. 373, 500 P.2d 815 (1972).

Evidence seized during general exploratory search will be suppressed. Where evidence was seized during a general exploratory search for which no probable cause existed, defendant's motion to suppress the evidence will be granted. *People v. Valdez*, 182 Colo. 80, 511 P.2d 472 (1973).

"Other" articles found in course of "proper" search are admissible. If an officer is conducting a search, either under a valid search warrant or incident to a valid arrest, where the search is such as is reasonably designed to uncover the articles for which he is looking and in the course of such search discovers contraband or articles the possession of which is a crime, other than those for which he was originally searching, he is not required to shut his eyes and refrain from seizing that material under the penalty that if he does seize it, it cannot be admitted in evidence. *Hernandez v. People*, 153 Colo. 316, 385 P.2d 996 (1963).

And no suppression of fruits or instruments of crime, and contraband. *Harris v. United States*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947), upheld the validity of seizure of fruits of a crime, instrumentalities of a crime, and contraband articles; such items may be referred to as "Harris articles", and where items are "Harris articles", a trial court is correct in denying a suppression motion with respect to them. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

But burden on state where such articles not connected with crime "per se". When a defendant demonstrates that an article is not specifically described in the search warrant and

it is not "per se" connected with criminal activity, the burden of showing that it is so connected falls upon the state. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971); *People v. Wilson*, 173 Colo. 536, 482 P.2d 355 (1971).

And if state sustains burden, the articles should not be suppressed. *People v. Wilson*, 173 Colo. 536, 482 P.2d 355 (1971).

However, where showing not made, nonspecified articles suppressed. When the district attorney fails to make the requisite showing, the trial court should sustain the motion as it relates to nonspecified articles not "per se" connected with criminal activity. *People v. Wilson*, 173 Colo. 536, 482 P.2d 355 (1971).

"Mere evidence" seized must be shown to have a "nexus" with case and defendant. "Mere evidence" consists of articles which are not fruits, instrumentalities, or contraband, and which are not "per se" associated with criminal activity, but which an officer executing a warrant has probable cause to believe are associated with criminal activity, and "mere evidence" which is seized within the scope of the search authorized by a warrant must be shown to have a "nexus" with the case in which a motion to suppress is filed and with at least one of the defendants in the case. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971); *People v. LaRocco*, 178 Colo. 196, 496 P.2d 314 (1972).

5. No Probable Cause.

Matter of probable cause not "res judicata". The trial court is not bound to conclude that because a search warrant had been issued the matter of the existence of probable cause for the issuance thereof was "res judicata", inasmuch as it is for the judge who determines the adversary proceeding to decide all questions relating to the admissibility of the evidence offered by the litigants. *Gonzales v. District Court*, 164 Colo. 433, 435 P.2d 384 (1967).

Warrant routinely issued at request of accusing officer clearly unconstitutional. Where a search warrant was routinely issued at the request of the accusing officer, without the slightest showing of probable cause, it therefore clearly violates the fundamental principle that the basis for the issuance of a search warrant must be determined by a judicial officer based on facts and not on the conclusion of the applicant. Consequently, such a search warrant is issued in violation of long-established fundamental constitutional standards, and any evidence seized under its authority should be excluded from evidence in the trial court, unless there is other legal basis for its admission. *Brown v. Patterson*, 275 F. Supp. 629 (D. Colo. 1967), *aff'd*, 393 F.2d 733 (10th Cir. 1968).

Independent determination of probable cause to search specified place. The fact that

the police did not request a warrant to search additional places likely to contain incriminating evidence is irrelevant to the independent determination of probable cause to search the place specified in the warrant. *People v. Chase*, 675 P.2d 315 (Colo., 1984).

Affidavit introduced where warrant challenged for lack of probable cause. When a search warrant is challenged for lack of probable cause, the supporting affidavit is an essential element to be introduced in evidence. *People v. Espinoza*, 195 Colo. 127, 575 P.2d 851 (1978).

Where supporting affidavit lacks probable cause, warrant invalid. Where the affidavit upon which a search warrant was issued was not sufficient to establish probable cause, the search and resultant arrest of defendant are part of the illegal fruits of an invalid warrant. *Zamora v. People*, 175 Colo. 340, 487 P.2d 1116 (1971).

Warrant based on observations of police employee in response to invitation not invalid. Where a visit by a police employee is legitimately in response to an invitation by the defendant, a later search is not invalidated by the fact that the employee made observations which became part of the basis for the warrant. *People v. Greathouse*, 173 Colo. 103, 476 P.2d 259 (1970).

Affidavit in support of search warrant was not insufficient because it was predicated upon "double hearsay". *People v. Quintana*, 183 Colo. 81, 514 P.2d 1325 (1973).

But where the affidavit upon which a search warrant was predicated was based on "double hearsay", such does not render the warrant invalid. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970).

Such as where the information is conveyed by one police officer to another police officer. *People v. Quintana*, 183 Colo. 81, 514 P.2d 1325 (1973).

Even if hearsay turns out to be incorrect. If the material in the affidavit is stated to be or appears to be hearsay information obtained from an informant or other person and the information turns out to be incorrect, a court will not use hindsight as a test to determine whether the search warrant should or should not have been issued. *People v. Woods*, 175 Colo. 34, 485 P.2d 491 (1971).

Reliability of detective need not be shown. The fact that the affidavit did nothing to disclose the reliability of a detective—except the fact that he was a detective—does not affect its validity, since there is nothing requiring a showing of reliability of a detective. *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970).

Facts held sufficient to establish probable cause. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971); *People v. Vigil*, 175 Colo. 421, 489 P.2d 593 (1971); *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Facts held not sufficient to establish probable cause. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

6. Illegal Execution.

Officers must identify themselves before forced entry. Even with a valid warrant, before police officers attempt a forced entry into a place, they must first identify themselves and make their purpose known. *People v. Godinas*, 176 Colo. 391, 490 P.2d 945 (1971).

And forceful entries include entries without permission. Forceful entries need not involve the actual breaking of doors and windows, but may include merely entries made without permission. Thus, where officers enter through a door which is ajar without right and they do not announce their purpose, a subsequent knock on an interior door is made after an illegal entry and without announcing identity and purpose. *People v. Godinas*, 176 Colo. 391, 490 P.2d 945 (1971).

Copy of warrant need not be left personally with one confined in jail. The argument that the execution of a search warrant did not comply with this rule in that a copy of the warrant was not left with defendant personally is without merit where at the time of the search defendant was confined in jail, the officer upon whose affidavit the warrant was issued exhibited the warrant, receipt, and inventory of what was seized to defendant after seizure, and the copy of the warrant, receipt, and inventory was then placed in defendant's locker in the jail which contained his other personal belongings; in the absence of a showing of any prejudice resulting from this particular procedure, there is no reversible error. *People v. Aguilar*, 173 Colo. 260, 477 P.2d 462 (1970).

Warrant need not have copy of affidavit attached. There is nothing which requires that a person given a warrant must receive a copy of the underlying affidavit or that a copy thereof must be attached to the copy of the warrant which is served at the time of the search. *People v. Papez*, 652 P.2d 619 (Colo. App. 1982).

Where one recites he has "duly executed" warrant, authority to execute inferred. Where in the return and inventory made following the execution of a warrant, one recites that he has "duly executed the within search warrant", this alone justifies an inference and finding that the individual was authorized by law to execute such, and it thereupon becomes incumbent upon the defendant to show that he was not. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

Warrant not invalidated by failure to follow requirements as to return and inventory. Since the requirements of this rule relating to the making of the return and inventory are ministerial in nature, a failure to comply does not

render the search warrant or the seizure of the property pursuant thereto invalid. *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970).

Hence, failure to file the return within 10 days does not invalidate a search. *People v. Wilson*, 173 Colo. 536, 482 P.2d 355 (1971).

D. Hearing.

1. When Motion Made.

Suppression remedy not extended to grand jury proceedings. The remedy of suppression of evidence applies to a trial once an indictment has been returned, but has not been extended to grand jury proceedings considering an indictment. *People ex rel. Dunbar v. District Court*, 179 Colo. 321, 500 P.2d 819 (1972).

Purpose of rule to prevent introduction of issue of police misconduct into trial. The purpose of this rule is to prevent, whenever possible, the introduction of a collateral issue, that of whether the police acted improperly, into the trial on the issue of guilt. *Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968).

Rule on time to serve motions preserves right to raise fourth amendment issues. *Crim. P. 45(d)*, which must be read in conjunction with this rule, can adequately preserve the defendant's right to raise fourth amendment issues, while carrying out the salutary purpose of not commingling the fourth amendment issues with the guilt issue. *Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968).

Motion to suppress filed on the morning of the trial is not timely. *Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968).

Trial court's consideration of merits of a suppression motion does not render moot ruling by trial court that the motion was untimely. *People v. Tyler*, 874 P.2d 1037 (Colo. 1994).

Nor is motion filed day before trial, where grounds raised therein previously apparent. Where defendant files his motion to suppress on the afternoon before the day on which the trial is to begin, but all the grounds raised therein were clearly apparent in the record from the very first time counsel appeared, then under such circumstances the motion is not timely filed. *Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968).

Motion untimely where defendant possesses all pertinent information prior to trial. Where defendant possessed prior to trial all pertinent information relative to the seizure of evidence and its possible suppression, the trial court did not abuse its discretion in declaring the motion to suppress untimely. *People v. Hinchman*, 40 Colo. App. 9, 574 P.2d 866 (1977), rev'd on other grounds, 196 Colo. 526, 589 P.2d 917, cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979).

But trial court has discretionary power to entertain a suppression motion at trial. *People v. Stevens*, 183 Colo. 399, 517 P.2d 1336 (1973).

And if court rules on untimely motion, matter not waived unless discretion abused. If the trial court elects to rule on a untimely suppression motion raised at trial, an appellate court should not consider the matter waived unless it can be shown that the trial court abused its discretion in ruling on the merits of the motion. *People v. Stevens*, 183 Colo. 399, 517 P.2d 1336 (1973).

Defendant not to be penalized because belated motion to suppress heard. There cannot be read into this rule any intentment that the defendant is to be penalized because the court chose to hear and consider his belated motion to suppress. *People v. Voss*, 191 Colo. 338, 552 P.2d 1012 (1976).

Where proper pretrial request denied, court errs in not holding hearing at trial. Where the defendant is entitled to such a pretrial hearing which he requests, then a court which fails to grant a pretrial hearing again errs in not holding a hearing at the time the property objected to is offered in evidence by the prosecution; the defendant having made a proper request, the trial court errs in not holding a hearing. *Adargo v. People*, 173 Colo. 323, 478 P.2d 308 (1970).

Pretrial ruling on a motion to suppress does not necessarily bind the trial judge, and under certain circumstances, the trial court has a duty to consider "de novo" the issue of suppression. *Gibbons v. People*, 167 Colo. 83, 445 P.2d 408 (1968).

And within judge's discretion to hold additional evidentiary hearing. If it is necessary for the trial judge to hold an additional evidentiary hearing in order to arrive at the truth concerning a suppression of evidence motion, it is within his discretion to do so. *People v. Duncan*, 179 Colo. 253, 500 P.2d 137 (1972).

2. Procedure.

Rule provides for procedure to be followed when motion to suppress is filed. *Adargo v. People*, 173 Colo. 323, 478 P.2d 308 (1970).

Motion to suppress is interlocutory in character, and neither res judicata nor collateral estoppel applies to a ruling which is less than a final judgment. *People v. Lewis*, 659 P.2d 676 (Colo. 1983).

Court makes inquiry and bases determination solely on evidence presented. The trial court shall make an inquiry concerning the validity of the search and base its determination solely upon the evidence presented upon a hearing conducted by it on the motion of the petitioners. *Gonzales v. District Court*, 164 Colo. 433, 435 P.2d 384 (1967).

Burden is upon the state at a suppression hearing to show a connection between the evidence seized and the criminal activity for which the search was initiated in order that the evidence not be suppressed. *People v. LaRocco*, 178 Colo. 196, 496 P.2d 314 (1972).

When granting or denying a motion, the court should state appropriate findings of fact. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971).

It is the function of the court to determine the factual issues presented by a motion to suppress, and this fact in turn requires the judge to make findings of fact whenever he rules on a motion to suppress. *People v. Duncan*, 176 Colo. 427, 498 P.2d 941 (1971); *People v. Brazzel*, 18 P.3d 1285 (Colo. 2001).

And making conclusion of law instead is error. In a suppression hearing, when the court makes a conclusion of law rather than a required finding of fact, there is error. *People v. Duncan*, 176 Colo. 427, 498 P.2d 941 (1972).

But findings in second case may suffice for findings in identical first case. Where in one case the judge, in denying the motion to suppress, does not make sufficient findings, but in another case the findings upon denial of the motion to suppress are amply sufficient, then where the findings in the second case are by the same court although by a different judge, the rulings by both judges are the same, and the parties and the search — and in substantial effect the testimony — are identical, an appellate court is justified in considering the findings in the second case as governing the first case, for it would be useless to remand the first case for findings. *People v. Ramey*, 174 Colo. 250, 483 P.2d 374 (1971).

Finding that lesser crimes not included in wiretap statute, grounds for suppression. A finding that lesser crimes are not intended by congress to be included in the class of crimes for which a wiretap can be authorized does not render an entire state statute invalid, but is merely grounds for suppression. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

District judge may reconsider a motion to suppress previously denied by another district judge. *People v. Lewis*, 659 P.2d 676 (Colo. 1983).

Fourth amendment exclusionary rule is designed to deter police misconduct. Illegal police searches and district attorney preparedness are unrelated. The court ruling granting suppression of all evidence was tantamount to dismissal of the case, which was outside the court's authority to dismiss. *People v. Bakari*, 780 P.2d 1089 (Colo. 1989).

Suppression for a procedural flaw in argument does not serve the purpose of the exclusionary rule, which is solely to deter police misconduct, not prosecutorial error. *People v. Kirk*, 103 P.3d 918 (Colo. 2005).

3. Return of Property.

No right to return of illegal property. If property is legally seized and it is designed or intended for use as a means of committing a criminal offense or the possession of which is illegal, there is no right to have it returned. *People v. Angerstein*, 194 Colo. 376, 572 P.2d 479 (1977).

Return can be made only upon determination by judge. If certain property is seized under and by virtue of a search warrant, it was incumbent upon the officers seizing same to deal with it only in accordance with the provisions and terms of this rule; consequently, they cannot rightfully restore it to the party from whom taken until a judge has examined witnesses and made a determination. *Guyton v. Neal*, 48 Colo. 549, 111 P. 84 (1910).

Mandamus lies to compel officer to obey order to return goods. Where goods seized under a search warrant are ordered by the magistrate, on a hearing pursuant to this rule, to be returned by the officer to the person from whose premises they were taken, mandamus lies to compel the discharge of this ministerial duty. *Bell v. Thomas*, 49 Colo. 76, 111 P. 76, 31 L.R.A. (n.s.) 664 (1910).

But mandamus cannot lie to return goods while proceedings still pending. Mandamus will not lie to compel an officer to surrender goods seized upon a search warrant, in excess of what is described therein, while the proceedings under the search warrant are still pending. *Guyton v. Neal*, 48 Colo. 549, 111 P. 84 (1910).

A decision on a motion for return of property is ordinarily interlocutory and therefore unappealable, but actions for return of property prior to the initiation of any civil or criminal proceedings may be reviewed. In re Search Warrant for 2045 Franklin, Denver, 709 P.2d 597 (Colo. App. 1985).

4. Judicial Review.

Appellate procedures cannot be invoked to test propriety of suppression order. The order of a trial court by which a motion to suppress evidence is sustained is not a final judgment and, accordingly, does not come within any exceptions provided by rule or statute under which appellate procedures can be invoked to test the propriety of the order. *People v. Hernandez*, 155 Colo. 519, 395 P.2d 733 (1964).

But interlocutory appeals may be taken pursuant to C.A.R. 4.1. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970); *People v. McNulty*, 173 Colo. 491, 480 P.2d 560 (1971); *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971); *People v. Patterson*, 175 Colo. 19, 485 P.2d 494 (1971); *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971).

Contemporaneous objection rule applies to search and seizure issues. *Brown v. People*, 162 Colo. 406, 426 P.2d 764 (1967).

Issue of illegal evidence should be brought to attention of the trial court either by a pre-trial motion to suppress or at the trial when the prosecution offers evidence which the defendant claims is "tainted" because of the manner in which it was obtained by the prosecution. *Ferrell v. Vogt*, 161 Colo. 549, 423 P.2d 844 (1967).

And failure to raise objection tantamount to waiver. The failure to raise the objection of an illegal search and seizure by proper objection at the trial level is tantamount to a waiver. *Brown v. People*, 162 Colo. 406, 426 P.2d 764 (1967).

To preserve an issue for appeal, defendant must alert trial court to the particular issue. In case where defendant argued on appeal that search of his vehicle violated the fourth amendment and that trial court erred in admitting evidence found in the vehicle, defendant had waived the issue by failing to contest it at trial. Trial court's ruling that the search and seizure of the evidence was proper did not negate the waiver or preserve the issue for appeal. *People v. Cordova*, __ P.3d __ (Colo. App. 2011).

In absence of motion, ground of error disregarded. In the absence of a motion for return of items or to suppress them as evidence on the ground of illegal search and seizure, an alleged ground of error based thereon will be disregarded. *Salazar v. People*, 153 Colo. 93, 384 P.2d 725 (1963).

Where defendant denies possessory interest at hearing, cannot later claim possessory interest. At a suppression hearing where a defendant denies that he has a possessory interest in any of the items found, he cannot be allowed to later claim a possessory interest unsupported by the record and in direct contradiction of his own testimony in order to challenge the admission of the seized evidence. *People v. Towers*, 176 Colo. 295, 490 P.2d 302 (1971).

And guilty plea makes question of search's validity moot. The question of the validity of the search for and seizure of contraband goods becomes moot upon the entry of the plea of guilty. *Lucero v. People*, 164 Colo. 247, 434 P.2d 128 (1967).

Suppression order sustained where facts not shown on record on appeal. Order sustaining motion to suppress admission in evidence of items seized in execution of search warrant will be affirmed where record on appeal does not show essential facts on which trial court predicated its ruling. *People v. Cram*, 180 Colo. 418, 505 P.2d 1299 (1973).

Granting of motion to suppress held invalid. *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972).

Denial of motion to suppress upheld. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972); *People v. Tucci*, 179 Colo. 373, 500 P.2d 815 (1972); *People v. Cram*, 180 Colo. 418, 505 P.2d 1299 (1973).

VIII. RETURN OF PAPERS TO CLERK.

Warrant not invalidated by failure to indicate to whom papers to be returned. The failure to insert the names in the blank spaces provided in a search warrant for the purpose of indicating to whom the return is to be made and to whom a written inventory of the seized property is to be made is a deficiency of a ministerial nature and not such as to render a warrant invalid. *Brown v. People*, 158 Colo. 561, 408 P.2d 981 (1965).

And where return made to issuing court, no prejudice to defendant. Where the record supports the conclusion that the return was made to the court which issued the warrant, then, such being the state of the record and the obvious intent of the issuing magistrate, there can be no finding of prejudice to the defendant in regard to such an alleged deficiency of the warrant. *Brown v. People*, 158 Colo. 561, 408 P.2d 981 (1965).

IX. SUPPRESSION OF CONFESSION OR ADMISSION.

A. Grounds.

Confession deemed acknowledgment of truth of guilty fact. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

Statement taken as result of and following an unlawful arrest must be suppressed. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

And no distinction between "inculpatory" or "exculpatory" statements. No distinction may be drawn between "inculpatory" statements made by defendant and statements alleged to be merely "exculpatory", following an unlawful arrest. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

Not between formal arrest and police custody. The fact that the defendant is not under formal arrest at the time he made such statements is unimportant where he is in police custody, he is the main suspect, and the accusing finger is surely directed at defendant, in which case the questions of a police officer in this posture are obviously for the main purpose of eliciting incriminating statements from the defendant, and therefore, the trial court should exclude any oral incriminating statements. *Nez v. People*, 167 Colo. 23, 445 P.2d 68 (1968).

Prosecution has burden at suppression hearing to show that defendant was lawfully arrested. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

Judge may suppress statements made by defendant before he was given "Miranda

warning", but deny the suppression of statements made after the warning has been given. *People v. Garrison*, 176 Colo. 516, 491 P.2d 917 (1971).

Confession obtained after inadequate warning should be suppressed. Where defendant's confession is obtained after a warning of his rights, which does not meet the requirements of *Miranda*, a motion to suppress the confession should be granted. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971).

Suppression of incriminating statements warranted when defendant was subject to interrogation by police officers before being advised of *Miranda* rights. A routine encounter turned into a custodial situation, as defendant was physically surrounded by officers, was not free to go during questioning, and had "objective reasons to believe that he was under arrest"; such circumstances constituted custody. *People v. Null*, 233 P.3d 670 (Colo. 2010).

Stereotype warning cannot be the sole basis of the court's determination that a statement was voluntary and that the defendant was aware of his rights and waived and relinquished those rights. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

If written confession is direct exploitation of prior illegality, it is inadmissible as the "fruit of the poisonous tree". *People v. Algien*, 180 Colo. 1, 501 P.2d 468 (1972).

Similarly, search conducted pursuant to illegal confession must be suppressed. Where the sole basis of a probable cause for the search of the defendant's home presented in the affidavit is his confession and that confession was illegally obtained, then, under the "fruit of the poison tree" doctrine, any articles obtained must be suppressed. *People v. Vigil*, 175 Colo. 373, 489 P.2d 588 (1971).

Good faith basis required to challenge warrant affidavits. As conditions to a veracity hearing testing the truth of averments contained in a warrant affidavit, a motion to suppress must be supported by one or more affidavits reflecting a good faith basis for the challenge and contain a specification of the precise statements challenged. *People v. Dailey*, 639 P.2d 1068 (Colo. 1982).

Voluntariness should be determined based on the totality of the circumstances, including the occurrences and events surrounding the confession and the presence or absence of official misconduct. *People v. Sparks*, 748 P.2d 795 (Colo. 1988); *People v. Mounts*, 801 P.2d 1199 (Colo. 1990).

Confession given after proper warnings not defective just because prior statements illegal. A confession obtained after proper constitutional warnings are given is not defective just because prior statements might be tainted with illegality. *People v. Potter*, 176 Colo. 510, 491 P.2d 974 (1971).

But time lapse between interrogations found insufficient to remove original taint from confession. *People v. Algien*, 180 Colo. 1, 501 P.2d 468 (1972).

"Totality of circumstances" standard. Courts must determine whether a confession given in a noncustodial setting is voluntary under the "totality of circumstances" standard. *People v. Johnson*, 671 P.2d 958 (Colo. 1983).

Confession properly suppressed where defendant's will was overborne by coercive conduct of police. Defendant's statements concerning drugs in his pockets were made after sustaining serious facial fractures and other injuries from the police and while he feared the police would use further force. *People v. Vigil*, 242 P.3d 1092 (Colo. 2010).

Trial court must consider all attendant circumstances to determine whether coercion of first confession infected second confession. Officers receiving subsequent confessions cannot merely be the beneficiaries of earlier pressure improperly applied to defendant. Defendant declined further medical treatment for his serious injuries, was released to the same officers who had inflicted the injuries, and was interrogated by those officers at 2:00 a.m. The evidence supports the trial court's ruling that defendant's subsequent statements were made under the lingering coercion of the physical force used against him and were thus properly suppressed. *People v. Vigil*, 242 P.3d 1092 (Colo. 2010).

B. When Motion Made.

Defendant entitled to object to confession's use at some stage in proceedings. A defendant has a constitutional right at some stage in the proceedings to object to the use of a confession and to have a "fair and reliable determination" on the issue of voluntariness. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968); *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

But pretrial hearing not constitutional requirement. While the better practice, at least with questions involving the admissibility of confessions and admissions, is to conduct a hearing before the jury becomes aware that the evidence exists, such has never made a pretrial hearing a constitutional requirement. Whether or not a reference to such evidence before the jury might result in a denial of the defendant's constitutional rights is a matter to be considered on a case-by-case basis. *People v. Renfrow*, 172 Colo. 399, 473 P.2d 957 (1970).

Issue of timeliness of motion moot when court entertains motion. When the court determines to entertain a motion to suppress and conduct a hearing thereon, the issue of the timeliness of the motion becomes moot and can no

longer be a proper ground for denial thereof. *People v. Robertson*, 40 Colo. App. 386, 577 P.2d 314 (1978).

C. Procedure.

Procedural guidelines same for determining admissibility of confession and "voluntariness" of blood test. It is proper for a trial judge to resolve the matter as to the "voluntariness" of the blood alcohol test along the same procedural lines as would be followed in determining the admissibility, or nonadmissibility, of a confession. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

Express or contemporaneous objection to admission of confession unnecessary where voluntariness issue evident. It is not necessary that there be an express objection by the defendant to the admission of the confession by a motion to suppress or by contemporaneous objection, for the trial judge is required to conduct a hearing when it becomes evident to him that voluntariness is in issue, and an awareness on the part of the trial judge that the defendant is questioning the circumstances under which the statements were obtained is sufficient. *Whitman v. People*, 170 Colo. 189, 460 P.2d 767 (1969).

Denial of hearing on voluntariness is error. The denial of defense counsel's request for a hearing to determine whether defendant's statements following his arrest were voluntarily made is error. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

Trial judge, and not the jury, determines the admissibility of a confession where objection is made on the ground that the confession was involuntarily made. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

And court must make findings of fact and law. Before incriminating statements or confessions, to which objections have been made, can be admitted in evidence, the court must make findings of fact and law that the statements and confessions under consideration were voluntarily given with full understanding of the accused's rights. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968); *Espinoza v. People*, 178 Colo. 391, 497 P.2d 994 (1972).

Before a trial court may rule that a confession is voluntary and admissible, or that it is involuntary and must be suppressed, the court must make sufficiently clear and detailed findings of fact and conclusions of law on the record to permit meaningful appellate review. *People v. McIntyre*, 789 P.2d 1108 (Colo. 1990).

And the mere denial of defendant's motion to suppress, without more, does not satisfy these requirements. *Espinoza v. People*, 178 Colo. 391, 497 P.2d 994 (1972).

Showings required for admission of confession. On a motion to suppress a confession made to police officers without assistance of an

attorney, the prosecution must prove, by clear and convincing evidence, that the defendant knowingly, voluntarily and intelligently waived his right to counsel and his right against self-incrimination and must prove, by a preponderance of the evidence, that the confession was made voluntarily. *People v. Fish*, 660 P.2d 505 (Colo. 1983).

Court finds whether statement voluntary, and whether defendant voluntarily waived constitutional privileges. Where the defendant makes a motion under this rule, it is incumbent upon the trial court to find whether the statement was given freely and voluntarily without any improper compelling influences and whether the defendant voluntarily, knowingly, and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Espinoza v. People*, 178 Colo. 391, 497 P.2d 994 (1972).

And trial judge must find that the statement was voluntary beyond a reasonable doubt. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

Jury precluded from fully resolving issue of voluntariness. Under the federal constitution, a fair and reliable determination of the voluntariness of a confession precludes the conflicting jury from fully resolving the issue. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

Including the taking of a blood alcohol test. The defendant has the right to a "fair and reliable determination" on the issue as to whether he gave his consent to the taking of a blood alcohol test, and therefore, it is improper for the trial court to permit the jury to "fully resolve" this matter. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

But where issues resolved against defendant, weight given to confession left to jury. Where the trial court conducts a full "in camera" hearing to determine whether defendant's confession was voluntary and to ascertain whether defendant was advised of rights afforded him by *Miranda v. Arizona*, then, where these issues are resolved against defendant, the weight to be given to defendant's confession is

properly left to jury. *People v. Lovato*, 180 Colo. 445, 506 P.2d 361 (1973).

And where evidence not sufficient to require exclusion, confession's voluntariness question for jury. Whenever there is evidence, not sufficient to require exclusion of the alleged confession, but sufficient to raise a question as to the weight to which it is entitled at the hands of the jury, the court must refer the question of the voluntariness of the confession to the jury under proper instructions. *Baker v. People*, 168 Colo. 11, 449 P.2d 815 (1969) (but see *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968); *People v. Lovato*, 180 Colo. 445, 506 P.2d 361 (1973)).

However, judge must first affirmatively find confession voluntarily given before submitted to jury. The fact that the jury determines the weight to be given a confession, or, as is sometimes the practice, the fact that the issue of the voluntariness of a confession, though already determined by the trial court, is also submitted to the jury under proper instructions, in nowise alters the fundamental rule that before a confession is admitted into evidence the trial judge must first affirmatively find that the confession was voluntarily given. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

Or that blood alcohol test was taken with consent. Where an objection is made by a defendant to the introduction into evidence of the results of a blood alcohol test on the ground that the test was taken without his consent, the trial court, after hearing, must make a specific and affirmative finding that such consent was given before this line of testimony may with propriety be submitted to the jury for its consideration. *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).

When no evidence on voluntariness, matter not submitted to jury. When there is no evidence which raises a question as to the voluntariness of a confession, the matter need not be submitted to the jury. *Baker v. People*, 168 Colo. 11, 449 P.2d 815 (1969).

Evidence held sufficient to support finding of voluntary confession. *People v. Valencia*, 181 Colo. 36, 506 P.2d 743 (1973).

Rule 41.1. Court Order for Nontestimonial Identification

(a) **Authority to Issue Order.** A nontestimonial identification order authorized by this Rule may be issued by any judge of the Supreme, District, Superior, County Court, or Court of Appeals.

(b) **Time of Application.** A request for a nontestimonial identification order may be made prior to the arrest of a suspect, after arrest and prior to trial or, when special circumstances of the case make it appropriate, during trial.

(c) **Basis for Order.** An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge, or by the procedures set forth in Crim. P. 41(c)(3), and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed;

(2) That there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

(d) **Issuance.** Upon a showing that the grounds specified in section (c) exist, the judge shall issue an order directed to any peace officer to take the person named in the affidavit into custody to obtain nontestimonial identification. The judge shall direct that the designated nontestimonial identification procedures be conducted expeditiously. After such identification procedures have been completed, the person shall be released or charged with an offense.

(e) **Contents of Order.** An order to take into custody for nontestimonial identification shall contain:

(1) The name or description of the individual who is to give the nontestimonial identification;

(2) The names of any persons making affidavits for issuance of the order;

(3) The criminal offense concerning which the order has been issued and the nontestimonial identification procedures to be conducted specified therein;

(4) A mandate to the officer to whom the order is directed to detain the person for only such time as is necessary to obtain the nontestimonial identification;

(5) The typewritten or printed name of the judge issuing the order and his signature.

(f) **Execution and Return.**

(1) Nontestimonial identification procedures may be conducted by any peace officer or other person designated by the judge. Blood tests shall be conducted under medical supervision, and the judge may require medical supervision for any other test ordered pursuant to this section when he deems such supervision necessary. No person who appears under an order of appearance issued pursuant to this section (f) shall be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures unless he is arrested for an offense.

(2) The order may be executed and returned only within 14 days after its date.

(3) The order shall be executed in the daytime unless the issuing judge shall endorse thereupon that it may be served at any time, because it appears that the suspect may flee the jurisdiction if the order is not served forthwith.

(4) The officer executing the order shall give a copy of the order to the person upon which it is served.

(5) No search of the person who is to give nontestimonial identification may be made, except a protective search for weapons, unless a separate search warrant has been issued.

(6) A return shall be made to the issuing judge showing whether the person named has been:

(I) Detained for such nontestimonial identification;

(II) Released or arrested.

(7) If, at the time of such return, probable cause does not exist to believe that such person has committed the offense named in the affidavit or any other offense, the person named in the affidavit shall be entitled to move that the judge issue an order directing that the products of the nontestimonial identification procedures, and all copies thereof, be destroyed. Such motion shall, except for good cause shown, be granted.

(g) **Nontestimonial Identification Order at Request of Defendant.** A person arrested for or charged with an offense may request a judge to order a nontestimonial identification procedure. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge shall order the state to conduct such identification procedure involving the defendant under such terms and conditions as the judge shall prescribe.

(h) **Definition of Terms.** As used in this Rule, the following terms have the designated meanings:

(1) "Offense" means any felony, class 1 misdemeanor, or other crime which is punishable by imprisonment for more than one year.

(2) “Nontestimonial identification” includes, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing.

(i) **Motion to Suppress.** A person aggrieved by an order issued under this Rule may file a motion to suppress nontestimonial identification seized pursuant to such order and the said motion shall be granted if there were insufficient grounds for the issuance or the order was improperly issued. The motion to suppress the use of such nontestimonial identification as evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

Source: (f)(2) amended May 7, 2009, effective July 1, 2009; IP(c) amended and effective February 10, 2011; (f)(2) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For comment, “Beyond the Davis Dictum: Reforming Nontestimonial Identification Evidence Rules and Statutes”, see 79 U. Colo. L. Rev. 189 (2008).

Limited intrusions into privacy on less than probable cause are constitutional when:

(1) There must be an articulable and specific basis in fact for suspecting criminal activity at the outset; (2) the intrusion must be limited in scope, purpose, and duration; (3) the intrusion must be justified by substantial law-enforcement interests; and (4) there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer before the evidence obtained therefrom may be admitted in a criminal proceeding against the accused. *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Harris*, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

This rule is limited to nontestimonial identification evidence only and does not authorize the acquisition of testimony of communications protected by the privilege against self-incrimination. *People v. Harris*, 729 P.2d 1000 (Colo. App. 1986), aff’d, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

And this rule constitutional. This rule does not violate either the fourth amendment to the federal constitution or § 7 of art. II, Colo. Const. *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Harris*, 729 P.2d 1000 (Colo. 1986), aff’d, 762 P.2d 651 (Colo. 1988), cert. denied, 485 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

Voluntary surrender of nontestimonial evidence waives constitutional protections. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

Propriety of examination determined by totality of circumstances. When the propriety of an identification is at issue, such as a lineup

identification, the question of whether there is a substantial likelihood of irreparable misidentification is determined by examining the totality of the circumstances. *People v. Johnson*, 653 P.2d 737 (Colo. 1982).

Judicial order necessary only when authorities take someone into custody. Authorities must obtain a judicial order pursuant to this rule only when they take someone presently at liberty into custody for purposes of the nontestimonial identification. *People v. Peoples*, 200 Colo. 509, 616 P.2d 131 (1980).

And rule not applicable to suspect under arrest. The authority of law-enforcement officers to photograph, fingerprint, and measure a suspect while he is under arrest, confined, or awaiting trial has long been recognized, as well as the propriety of using photographs obtained thereby for identification purposes, and this rule is not applicable under those circumstances. *People v. Reynolds*, 38 Colo. App. 258, 559 P.2d 714 (1976).

This rule is not applicable to nontestimonial identifications of persons already in police custody pursuant to a lawful arrest. *People v. Peoples*, 200 Colo. 509, 616 P.2d 131 (1980).

Once probable cause exists to arrest, this rule is inapplicable. *People v. Harris*, 729 P.2d 1000 (Colo. App. 1986), aff’d, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

Nor where defendant voluntarily submits to investigatory procedures. The court need not concern itself with the investigatory procedures of this rule where defendants voluntarily submit to fingerprinting, thereby waiving their constitutional protections. *People v. Hannaman*, 181 Colo. 82, 507 P.2d 466 (1973).

Rule applies only to obtaining nontestimonial identification from the defendant himself and not to procedures on a third party. *People v. Braxton*, 807 P.2d 1214 (Colo. App. 1990).

Prosecution could not be sanctioned for police conduct in which it did not participate. Trial court may not preclude prosecution from applying for and obtaining order for nontestimonial identification evidence though blood and hair samples obtained by police through a warrantless search were suppressed. *People v. Diaz*, 55 P.3d 1171 (Colo. 2002).

Judge may order fingerprints of individual to be obtained when it is shown by an affidavit that: (1) A known criminal offense has been committed; (2) there is reason to suspect that the individual is connected with the perpetration of a crime; and (3) the individual's fingerprints are not in the files of the applying agency. *Stone v. People*, 174 Colo. 504, 485 P.2d 495 (1971).

Information obtained from anonymous tip may form basis for affidavit used to obtain an order for nontestimonial identification pursuant to this rule. *People v. Davis*, 669 P.2d 130 (Colo. 1983).

Nontestimonial evidence suppressed where prosecution fails to establish that affidavits sworn to. Where the prosecution fails to establish at trial that the affidavits required by section (c) of this rule were sworn to or affirmed before the court which issued the nontestimonial identification order, the nontestimonial evidence is properly suppressed. *People v. Hampton*, 198 Colo. 566, 603 P.2d 133 (1979).

No deprivation of procedural safeguards when county court issued a nontestimonial

identification order even though the offenses involved were committed in another jurisdiction. *Ginn v. County Court*, 677 P.2d 1387 (Colo. App. 1984).

Admissibility of statements of defendant while in custody for nontestimonial identification procedures. A statement of a suspect who is detained pursuant to an order to obtain nontestimonial evidence may be admissible under circumstances in which the suspect initiates a conversation with police and, despite a lack of coercion or interrogation, voluntarily offers information. *People v. Wilson*, 841 P.2d 337 (Colo. App. 1992).

This rule not for exclusive use of Colorado officials investigating offenses occurring in Colorado. Where the requirements of this rule are met, it is not an abuse of discretion for a county court to issue a nontestimonial identification order even though the offenses involved were committed in another jurisdiction. *Ginn v. County Court*, 677 P.2d 1387 (Colo. App. 1984).

Statement in affidavit not a judicial admission. Statement that probable cause for arrest did not yet exist in an affidavit in support of an order for nontestimonial identification is not a judicial admission. *People v. Page*, 907 P.2d 624 (Colo. App. 1995).

Applied in *People v. Morgan*, 619 P.2d 64 (Colo. 1980); *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981); *People v. District Court*, 664 P.2d 247 (Colo. 1983).

Rule 41.2. Interlocutory Appeal from the County Court

Repealed July 16, 1992, effective November 1, 1992.

Rule 41.3. Interlocutory Appeal from District Court

See Colorado Appellate Rules.

Rule 42. No Colorado Rule

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the preliminary hearing, at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

(1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) At a conference or argument upon a question of law.

(3) At a reduction of sentence under Rule 35.

(d) **Waiver.** The voluntary failure of the defendant to appear at the preliminary hearing may be construed by the court as an implied waiver of his right to a preliminary hearing.

(e) **Presence of the Defendant by Interactive Audiovisual Device.**

(1) Definitions. As used in this Rule 43:

(I) "Interactive audiovisual device" means a television or computer based audiovisual system capable of two-way transmission and of sufficient audio and visual quality that persons using the system can view and converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device, in lieu of the defendant's physical presence, for the following hearings:

(I) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;

(II) Further appearances for the filing of charges or for setting the preliminary hearing;

(III) Hearings to modify bail;

(IV) Entry of pleas and associated sentencing or probation violation hearings in misdemeanor, petty offense, and traffic cases where the offense charged is not included within those offenses enumerated in C.R.S. 24-4.1-302 (I).

(V) Waivers of preliminary hearing;

(VI) Restitution hearings;

(VII) Appeal bond hearings;

(VIII) Crim.P. 35(B) hearings.

(3) Minimum standards. Every use of an interactive audiovisual device must comply with the following minimum standards in addition to those set forth in Crim.P. 43(e)(I):

(I) If defense counsel appears, such appearance shall be at the same physical location as the defendant if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

(II) No defendant shall be compelled to appear by interactive video device at a hearing pursuant to subsection (e)(2)(III), (VI) or (VIII) of this rule.

(III) Installation of the interactive audiovisual device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe, and, where appropriate, participate in the hearing.

(IV) Any hearing held pursuant to Crim.P. 43(e)(2)(IV) shall be conducted with the written consent of the defendant. The court shall advise a defendant of the following prior to obtaining a defendant's written consent and prior to any plea discussions being conducted:

(a) The rights enumerated in Crim.P. 5(2).

(b) The defendant has the right to appear in person and will not be prejudiced if he chooses to do so.

(c) The defendant has the right to have his or her counsel appear with him or her at the same physical location.

(d) The defendant's decision to appear by use of an interactive audiovisual device must be voluntary on the defendant's part and must not be the result of undue influence or coercion on the part of anyone.

(e) If the defendant is pro se, the identity and role of all individuals with whom the defendant may have contact through the interactive audiovisual device.

(V) An interactive audiovisual system used for hearings pursuant to Crim.P. 43(e)(2)(IV) shall include the ability to electronically transfer documents between the defendant and the court and such transferred documents shall be considered the same as originals.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device.

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring under Crim.P. 5, the court may conduct the hearing by use of an interactive audiovisual procedure which does not comply with the minimum standards set forth in subsection (3).

Source: (e) added and adopted December 19, 1996, effective March 1, 1997; (e) amended and adopted and comment added and adopted May 11, 2006, effective July 1, 2006; (e) amended and effective June 17, 2010.

COMMENT

The court recommends that defendants be informed of their rights pursuant to this rule by showing such defendants a pre-recorded video containing the judicial advisement contained in this rule. The video should be shown prior to any jail authorities asking whether a defendant

planned to elect to participate by audiovisual device. The court recognized that such audiovisual devices will be used to conduct plea discussions. Accordingly, the pre-recorded video should also explain the plea discussion process.

ANNOTATION

Waiver required for absence from trial. The trial court must establish a voluntary and intelligent waiver by a defendant concerning an absence from trial. *People v. Campbell*, 785 P.2d 153 (Colo. App. 1989), rev'd on other grounds, 814 P.2d 1 (Colo. 1991).

Waiver must be knowing, intelligent, and voluntary. Waiver is knowing and intelligent when a defendant has had notice of the consequences of not appearing. *People v. Stephenson*, 165 P.3d 860 (Colo. App. 2007).

Absence from trial compelled by medical necessity may generally be deemed voluntary, and the determination of whether defendant is "voluntarily absent" requires a fact-specific inquiry into the type of medical condition, the circumstances surrounding the absence, and defendant's conduct and statements. *People v. Stephenson*, 165 P.3d 860 (Colo. App. 2007).

A defendant's absence may be deemed voluntary when the record establishes that defendant created the medical necessity by attempting suicide in order to effect his or her absence from trial. *People v. Price*, 240 P.3d 557 (Colo. App. 2010).

Removal of defendant from court during trial did not abridge defendant's constitutional rights. Where defendant had been warned numerous times about his courtroom behavior including getting up from his seat and moving towards judge on one occasion and physically attacking a witness on the witness stand on another so that court would either have

to shackle, bind, and gag defendant in court or remove him to another room where he could watch the trial via closed-circuit television and freely talk to his attorney by telephone, trial court used constitutionally permissible method pursuant to (b)(2) to deal with disruptive defendant. *People v. Davis*, 851 P.2d 239 (Colo. App. 1993).

Although the trial court failed to include the mandatory parole period during the sentencing period and mittimus, it is not a violation of the defendant's right to be present at sentencing to subsequently correct the mittimus to include the mandatory parole period. *People v. Nelson*, 9 P.3d 1177 (Colo. App. 2000).

Trial court's action in making its resentencing decision the subject of a written order, rather than reconvening a hearing to announce that decision, was harmless. Defendant was present at both his sentencing and resentencing hearings when the information relied upon by the court for its sentencing decision was presented, and defendant raised no objection when, at the completion of the resentencing hearing, the court reserved its decision on resentencing and stated its intention to announce that decision at a later date. *People v. Luu*, 983 P.2d 15 (Colo. App. 1998).

Due process does not require the defendant's presence when his presence would be useless, or the benefit nebulous. *People v. Luu*, 983 P.2d 15 (Colo. App. 1998).

Applied in *People v. Trefethen*, 751 P.2d 657 (Colo. App. 1987).

Rule 44. Appearance of Counsel

(a) Appointment of Counsel. If the defendant appears in court without counsel, the court shall advise the defendant of the right to counsel. In an appropriate case, if, upon the defendant's affidavit or sworn testimony and other investigation, the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent

the defendant at every stage of the trial court proceedings. In any misdemeanor case the court may appoint as counsel law students who shall act under the provisions of C.R.C.P. 226. No lawyer need be appointed for a defendant who, after being advised, with full knowledge of his rights thereto, elects to proceed without counsel. Except in a case in which a law student has been appointed, unless good cause exists otherwise, the court shall appoint the state public defender.

(b) **Multiple Representation by Counsel.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

(c) **Request for Withdrawal of a Lawyer During Proceedings.** Except as provided in section (e), withdrawal of a lawyer in a criminal case is a matter within the sound discretion of the court. In exercising such discretion, the court shall balance the need for orderly administration of justice with the facts underlying the request.

(d) **Procedure for Withdrawal During Proceedings.**

(1) A lawyer may withdraw from a case only upon order of the court. In the discretion of the court, a hearing on a motion to withdraw may be waived with the consent of the prosecution and if a written substitution of counsel is filed which is signed by current counsel, future counsel and the defendant. A request to withdraw shall be in writing or may be made orally in the discretion of the court and shall state the grounds for the request. A request to withdraw shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Advance notice of a request to withdraw shall be given to the defendant before any hearing, if practicable. Such notice to withdraw shall include:

- (I) That the attorney wishes to withdraw;
- (II) The grounds for withdrawal;
- (III) That the defendant has the right to object to withdrawal;
- (IV) That a hearing will be held and withdrawal will only be allowed if the court approves;
- (V) That the defendant has the obligation to appear at all previously scheduled court dates;
- (VI) That if the request to withdraw is granted, then the defendant will have the obligation to hire other counsel, request the appointment of counsel by the court or elect to represent himself or herself.

(2) Upon setting of a hearing on a motion to withdraw, the lawyer shall make reasonable efforts to give the defendant actual notice of the date, time and place of the hearing. No hearing shall be conducted without the presence of the defendant unless the motion is made subsequent to the failure of the defendant to appear in court as scheduled. A hearing need not be held and notice need not be given to a defendant when a motion to withdraw is filed after a defendant has failed to appear for a scheduled court appearance and has not reappeared within six months.

(e) **Termination of Representation.**

(1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate at the conclusion of trial court proceedings and after a final determination of restitution. Trial court proceedings shall conclude at the point in time:

- (I) When dismissal is granted by the court and no timely appeal has been filed;
- (II) When an order enters granting a deferred prosecution, deferred sentence, or probation;
- (III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim.P. 35(b) or such motion so filed is ruled on; or
- (IV) When a notice of appeal is filed by the defendant.

(2) At the time a deferred prosecution or deferred sentence is granted or at the time sentence is imposed upon conviction, the court shall inform the defendant when representation shall terminate.

Source: Entire rule amended June 19, 1986, effective January 1, 1987; entire rule amended and adopted December 19, 1996, effective March 1, 1997; (e) amended and adopted September 10, 2009, effective January 1, 2010.

ANNOTATION

Law reviews. For note, "Right to Counsel in Colorado", see 34 Rocky Mtn. L. Rev. 343 (1962). For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses recent cases relating to the right to counsel, see 15 Colo. Law. 1578 (1986).

Annotator's note. For other annotations concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and § 18-1-403.

Court to advise defendant of right to counsel and to make financial inquiry. The rule imposes upon the trial court an affirmative duty to advise all criminal defendants, whether affluent or indigent, who appear without counsel of the right to counsel, and to inquire into the defendant's financial ability to employ counsel if pertinent. *Allen v. People*, 157 Colo. 582, 404 P.2d 266 (1965).

However, a defendant is not entitled to a presumption of poverty. *Allen v. People*, 157 Colo. 582, 404 P.2d 266 (1965).

Defendant with sufficient means accorded reasonable opportunity to employ attorney. If it appears that a defendant has sufficient means to employ an attorney of his own choosing, then he must be accorded a reasonable opportunity to do so. *Allen v. People*, 157 Colo. 582, 404 P.2d 266 (1965).

Attorney assigned to represent indigent defendant at every stage of trial court proceedings. If upon the defendant's affidavit or sworn testimony and other investigation the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent him at every stage of the trial court proceedings. *Allen v. People*, 157 Colo. 582, 404 P.2d 266 (1965).

Including imposition of sentence. This rule provides that in the case of an indigent defendant in a criminal proceeding, an attorney shall be assigned to represent him at every stage of the trial court proceedings, which includes imposition of sentence. The imposition of sentence is certainly one stage of the proceedings before the trial court; indeed, it is perhaps the most critical stage of the proceeding. *John Doe v. People*, 160 Colo. 215, 416 P.2d 376 (1966); *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

So, if a defendant later insists on this right, he is entitled to have the sentence vacated and a new one imposed, at which time he should be represented by an attorney and provided counsel if he is unable to employ his own lawyer. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

Right to counsel extended to contempt proceedings resulting in imprisonment. The right to counsel must be extended to all contempt proceedings, whether labeled civil or criminal, which result in the imprisonment of the witness. *Padilla v. Padilla*, 645 P.2d 1327 (Colo. App. 1982).

Previously, appointment of counsel on appeal was generally denied to indigents in all cases except capital. In re *Petition of Griffin*, 152 Colo. 347, 382 P.2d 202 (1963).

Court must establish that waiver of right made knowingly and intelligently. Once it is established that a defendant has a right to counsel, the court must establish that any waiver of that constitutional right is made knowingly and intelligently. *Padilla v. Padilla*, 645 P.2d 1327 (Colo. App. 1982).

Court obligated to see that appointed counsel of sufficient ability and experience. When a court is called upon to appoint counsel for a defendant in a criminal case, it is its duty to see that counsel of sufficient ability and experience is assigned to fairly represent the defendant. *Carlson v. People*, 91 Colo. 418, 15 P.2d 625 (1932).

One consenting to representation by counsel employed by another cannot complain counsel ineffective. One who has knowledge that he could have court appoint counsel if desired but consents to representation by counsel employed by another for him, cannot complain that counsel was ineffective without a showing of substantial prejudice to the defendant because of counsel's representation. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

Joint representation does not result in a per se violation of the right to effective counsel. Neither defendant testified, so defense counsel was not faced with the possibility of commenting on the credibility of one to the detriment of the other. *People v. Tafoya*, 833 P.2d 841 (Colo. App. 1992).

Trial counsel was counsel of record at the time the 45-day period for filing a notice of

appeal under C.A.R. 4(b) expired where trial counsel filed a Crim. P. 35(b) motion before appellate counsel was appointed and trial counsel had not moved to withdraw. *People v. Baker*, 104 P.3d 893 (Colo. 2005).

Applied in *Buckles v. People*, 162 Colo. 51, 424 P.2d 774 (1967).

Rule 45. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, the day of the event from which the designated period of time begins to run is not to be included. Thereafter, every day shall be counted including holidays, Saturdays, and Sundays. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. As used in these Rules, “legal holiday” includes the first day of January, observed as New Year’s Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran’s Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) **Enlargement.** When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order; or,

(2) Upon motion, permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect.

(c) to (e) Repealed.

(f) **Inmate Filings.** A document filed by an inmate confined in an institution is timely filed with the court if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; (a) and (e) amended and Comment added May 7, 2009, effective July 1, 2009; (a) amended, (c), (d), and (e) repealed, and comment deleted and adopted December 14, 2011, effective July 1, 2012; comment added and adopted June 21, 2012, effective July 1, 2012.

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

Time computation is sometimes “forward,” meaning starting the count at a particular stated

event [such as date of filing] and counting forward to the deadline date. Counting “backward” means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do

not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

Law reviews. For article, “Rule of Seven’ for Trial Lawyers: Calculating Litigation Deadlines”, see 41 Colo. Law. 33 (January 2012).

Rule preserves defendant’s right to raise fourth amendment issue. Section (d) of this rule which must be read in conjunction with Rule 41(e), Crim. P., adequately preserves a defendant’s right to raise a fourth amendment issue, while carrying out the salutary purpose of not commingling the fourth amendment issue with the guilt issue. *Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968).

Purpose of section (d) is to allow time for adequate preparation. *People v. District Court*, 189 Colo. 159, 538 P.2d 887 (1975).

And notice served same day as pretrial hearing clear violation of rule. Where notice of motion to disqualify the district attorney from further participation in a criminal case is given to the district attorney’s office the same morning that the hearing on the motion was held, the consideration of this motion by the trial court when the district attorney did not have fair notice and an opportunity to defend himself is a clear violation of the provisions of this rule. *People v. District Court*, 189 Colo. 159, 538 P.2d 887 (1975).

But failure to object to lack of notice constitutes waiver. If defendant fails to object to the lack of notice at the hearing prior to trial or fails to request a continuance, his silence constitutes a waiver of the five-day notice. *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

Timely motion for new trial is not jurisdictional in the sense that without it the court would lack authority to adjudicate the subject matter. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Rather, it is a procedural prerequisite intended to assure that the matters appealed have been considered by the trial court. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

And prosecution’s failure to object waives timeliness issue on appeal. The people, by failing to object to the trial court’s hearing and

deciding the new trial motion, waived their right to raise the timeliness issue on appeal. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Excusable neglect. A trial court may extend the time for filing a motion on the basis that failure to act on time was the result of excusable neglect if there was a factual finding to support a claim of ineffective assistance of counsel. *Swainson v. People*, 712 P.2d 479 (Colo. 1986).

Excusable neglect does not include family considerations or lack of knowledge of the law for purposes of extending the time to file a Crim. P. 35 motion. *People v. Delgado*, 83 P.3d 1144 (Colo. App. 2003), rev’d on other grounds, 105 P.3d 634 (Colo. 2005).

Burden of showing excusable neglect under section (b) is upon the defendant. *People v. Dillon*, 655 P.2d 841 (Colo. 1982).

Defendant wrongfully believing appeal being processed by attorney allowed to file untimely motion. In light of the defendant’s uncontroverted belief that his attorney is processing his appeal, the trial court abuses its discretion when it later denies defendant’s motion to file an untimely motion and thereby perfect his appeal. *People v. Dillon*, 631 P.2d 1153 (Colo. App. 1981).

Considerations governing determination of effect of time limitations in criminal cases and in civil cases. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Mere speculation regarding the court’s disposition of a motion for a continuance or to recall a witness does not obviate the defendant’s duty to seek such procedures if the defendant is to base his claim of prejudice on the inability to prepare new theories of defense or to cross-examine past witnesses in light of previously undisclosed evidence. *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).

Applied in *People v. Masamba*, 39 Colo. App. 187, 563 P.2d 382 (1977); *People v. Houpe*, 41 Colo. App. 253, 586 P.2d 241 (1978); *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Rule 46. Bail

In considering the question of bail, the Court shall be governed by the statutes and the Constitution of the State of Colorado and the United States Constitution.

Source: Entire rule repealed and readopted April 2, 1987, effective September 1, 1987.

Cross references: For right to bail and exceptions thereto, see § 19 of article II of the state constitution; for prohibition on excessive bail, see § 20 of article II of the state constitution; for bailable offenses, see article 4 of title 16, C.R.S.

ANNOTATION

Rule does not authorize setting aside a judgment on a forfeiture of a bond. *People v.*

Caro, 753 P.2d 196 (Colo. 1988) (decided under rule before 1987 repeal and readoption).

Rule 46.1. Bail — County Courts

Repealed April 2, 1987, effective September 1, 1987.

Rule 47. Motions

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

(b) A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than 7 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time.

Source: Entire rule amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Court is justified in considering statements in affidavits in support of motion to dismiss indictments as evidence of the facts asserted. *People v. Lewis*, 183 Colo. 236, 516 P.2d 416 (1973).

If party disagrees with allegations in affidavits attached to motion to dismiss indict-

ments, he should file counter affidavits or call witnesses to dispute the allegations. *People v. Lewis*, 183 Colo. 236, 516 P.2d 416 (1973).

Applied in *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *People v. Buggs*, 631 P.2d 1200 (Colo. App. 1981).

Rule 48. Dismissal

(a) **By the State.** No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and with the court's consent and approval. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be filed during the trial without the defendant's consent.

(b) By the Court.

(1) If, after the filing of a complaint, there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a district court, the court may dismiss the prosecution. Except as otherwise provided in this Rule, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, the pending charges shall be dismissed, whether he is in custody or on bail, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(2) If trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months period from the date upon which the continuance was granted.

(3.5) If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, the period in which the trial shall be had is extended for an additional six months' period from the date of the defendant's next appearance.

(4) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(5) To be entitled to a dismissal under subsection (b)(1) of this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this section.

(5.1) If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this rule.

(6) In computing the time within which a defendant shall be brought to trial as provided in subsection (b)(1) of this Rule, the following periods of time shall be excluded:

(I) Any period during which the defendant is incompetent to stand trial or is unable to appear by reason of illness or physical disability or is under observation or examination at any time after the issue of insanity, incompetency or impaired mental condition is raised;

COMMITTEE COMMENT

This amendment to Crim. P. 48(b)(6)(I) is designed to bring this Rule into conformity with its corresponding statute, Section 18-1-405(6)(A), 8B C.R.S. (1994 Supp.).

(II) The period of delay caused by an interlocutory appeal, an appeal from an order that dismisses one or more counts of a charging document prior to trial, or after issuance of a rule to show cause in an original action brought under Colorado Appellate Rule 21, whether commenced by the defendant or by the prosecution;

(III) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(IV) The period of delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial;

(V) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

(VI) The period of delay caused at the instance of the defendant;

(VII) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(A) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(B) The continuance is granted to allow the prosecuting attorney additional time in

felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court entered specific findings with respect to the justification.

(VIII) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs (I), (II), (III), (IV), and (V) of this subsection (6), not to exceed three months.

(IX) The period of delay between the filing of a motion pursuant to section 18-1-202 (11) and any decision by the court regarding such motion, and if such decision by the court transfers the case to another county, the period of delay until the first appearance of all the parties in a court of appropriate jurisdiction in the county to which the case has been transferred, and in such event the provisions of subsection (7) of this section shall apply.

(7) If a trial date has been fixed by the court and the case is subsequently transferred to a court in another county, the period within which trial must be had is extended for an additional three months from the date of the first appearance of all of the parties in a court of appropriate jurisdiction in the county to which the case has been transferred.

Source: (b)(3.5), (b)(5.1), (b)(6)(VIII), (b)(6)(IX), and (b)(7) added February 4, 1993, effective April 1, 1993; (b)(6)(I) amended and committee comment added, effective January 26, 1995; entire rule amended and adopted June 27, 2002, effective July 1, 2002.

ANNOTATION

- I. General Consideration.
- II. By the State.
- III. By the Court.
 - A. In General.
 - B. Right to Speedy Trial.
 - C. Exclusion of Periods of Delay.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with dismissal of indictments without prejudice, see 62 Den. U. L. Rev. 185 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses recent cases relating to speedy trials, see 15 Colo. Law. 1595 and 1617 (1986). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part I", see 31 Colo. Law. 115 (July 2002). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part II", see 31 Colo. Law. 59 (August 2002).

Annotator's note. For other annotations concerning speedy trials, see § 16 of art. II, Colo. Const., and § 18-1-405.

Intent of rule. This rule was designed to render the federal and state constitutional rights to a speedy trial more effective. Sweet v. Myers, 200 Colo. 50, 612 P.2d 75 (1980); People v. Sanchez, 649 P.2d 1049 (Colo. 1982).

An accused person's right to a speedy trial is ultimately grounded on the federal and state constitutions, and statutes relating to speedy trial are intended to render these constitutional guarantees more effective. Simakis v. District Court, 194 Colo. 436, 577 P.2d 3 (1978).

This rule was designed to substantially conform to § 18-1-405. Carr v. District Court, 190 Colo. 125, 543 P.2d 1253 (1975).

Both simplify constitutional parameters. This rule and § 18-1-405 clarify and simplify the parameters of the constitutional right to a speedy trial. Carr v. District Court, 190 Colo. 125, 543 P.2d 1253 (1975); People v. Cisneros, 193 Colo. 141, 563 P.2d 355 (1977); People v. Chavez, 779 P.2d 375 (Colo. 1989).

Policies underlying this rule and § 18-1-405, are the same as those relative to the uniform mandatory disposition of detainees act, §§ 16-14-101 to 16-14-108. People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Applied in People v. Flowers, 190 Colo. 453, 548 P.2d 918 (1976); Murphy v. District Court, 195 Colo. 149, 576 P.2d 163 (1978); Reliford v. People, 195 Colo. 549, 579 P.2d 1145 (1978); People v. District Court, 196 Colo. 420, 586 P.2d 1329 (1978); People v. Gonzales, 198 Colo. 546, 603 P.2d 139 (1979); People v. Wimer, 43 Colo. App. 237, 604 P.2d 1183 (1979); Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); People v. Small, 631 P.2d 148 (Colo. 1981); People v. Jones, 631 P.2d 1132 (Colo. 1981); People v. District Court, 632 P.2d 1022 (Colo. 1981); People v. Marquez, 644 P.2d 59 (Colo. App. 1981); People v. Velasquez, 641 P.2d 943 (Colo. 1982); People v. Ashton, 661 P.2d 291 (Colo. App. 1982); People v. Olds, 656 P.2d 705 (Colo. 1983); People v. Watson, 666 P.2d 1114 (Colo. App. 1983); People v. Harding, 671 P.2d 975 (Colo. App. 1983); People v. Castango, 674 P.2d 978 (Colo. App. 1983).

II. BY THE STATE.

District attorney's common-law power to enter nolle prosequi. Prior to the enactment of

this rule, the common-law rule was that the district attorney had the power to enter a nolle prosequi in a criminal case without the consent of the court. *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981).

Dismissal is function of district attorney. Neither the complaining witness nor the trial judge may dismiss a prosecution on behalf of the state; that is the function of the district attorney. *People v. Dennis*, 164 Colo. 163, 433 P.2d 339 (1967).

Trial court's discretion in reviewing motion to dismiss. In exercising its discretion in reviewing a motion to dismiss charges, the trial court should not serve merely as a rubber stamp for the prosecutor's decision. *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981).

The trial court's refusal to consent to a dismissal of charges is appropriate only where the evidence is clear and convincing that the interests of the defendant or the public are jeopardized by the district attorney's refusal to prosecute. *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981).

III. BY THE COURT.

A. In General.

Rule is independent of constitutional provisions. This rule is tied to the historical right and the inherent power of the court to dismiss a case for want of prosecution and is separate and independent of the constitutional right to a speedy trial. *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975).

The right to a speedy trial is guaranteed by § 16 of art. II, Colo. Const., and this constitutional protection is independent of any right established by statute or rule. *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975).

Provisions of this rule and the constitutional issue as to denial of speedy trial are mutually exclusive, and the resolution of one does not necessarily determine the resolution of the other. *Potter v. District Court*, 186 Colo. 1, 525 P.2d 429 (1974).

The obvious purpose of this rule is to prevent "dillydallying" on the part of the district attorney or the court in a criminal proceeding. *People v. Bates*, 155 Colo. 277, 394 P.2d 134 (1964); *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

Dismissal of charges sufficient to protect defendant's rights. Where defendant's trial took place within six months of defendant's plea of not guilty to the charges in the second indictment, and while the trial was not held until more than six months after defendant's plea to the charges of the original indictment, those charges were dismissed by the trial court, such dismissal was sufficient to protect defen-

dant's rights under § 18-1-405 and section (b)(1) of this rule. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Speedy trial is calculated separately for each criminal complaint. When charges in a complaint are properly dismissed within the speedy trial period without prejudice, they are a nullity. If defendant is arraigned under new charges, even if they are identical to the dismissed charges, the speedy trial period begins anew. *Huang v. County Court of Douglas County*, 98 P.3d 924 (Colo. App. 2003).

No dismissal where not authorized by rule or due process. The trial court may not, on its own motion, dismiss an action on behalf of the defendant prior to trial over the objection of the district attorney where such dismissal is not authorized under the rules and is not required by due process. *People v. Butz*, 37 Colo. App. 212, 547 P.2d 262 (1975).

Outrageous governmental conduct need not be prejudicial to defendant to constitute a violation of due process. *People v. Auld*, 815 P.2d 956 (Colo. App. 1991).

Trial court had no authority to dismiss case based on the theory that it was an abuse of prosecutorial discretion to retry the case. A district attorney has broad discretion in determining who shall be prosecuted and what crimes shall be charged, and such discretion may not be controlled or limited by judicial intervention, except in unusual circumstances which result in a denial of a particular defendant's due process right to fundamental fairness. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

Court's practice of postponing arraignment until all pretrial matters are concluded thwarts purpose of this rule and § 18-1-405. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

It is the joint responsibility of the district attorney and the trial court to assiduously avoid any occasion for a useless and unnecessary delay in the trial of a criminal case. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Relief in nature of prohibition appropriate remedy. Relief in the nature of prohibition under C.A.R. 21, is an appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

Relation of section (b) to Rule 248(b), C.M.C.R. Section (b) is the parallel rule to Rule 248(b), C.M.C.R. *Bachicha v. Municipal Court*, 41 Colo. App. 198, 581 P.2d 746 (1978).

Uniform Mandatory Disposition of Detainers Act controls in conflict with rule. When there is a conflict with the general speedy trial provisions of the Uniform Mandatory Disposition of Detainers Act and this rule, the provisions of the uniform act control. *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072 (1980).

B. Right to Speedy Trial.

Right to a speedy trial is not only for the benefit of the accused, but also for the protection of the public. It is essential that an early determination of guilt be made so that the innocent may be exonerated and the guilty punished. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971); *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Speedy trial provisions are designed to foster more effective prisoner treatment and rehabilitation by eliminating, as expeditiously as possible, the uncertainties surrounding outstanding criminal charges. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

Court lacks jurisdiction to try defendant in violation of speedy trial right. A court would be proceeding without jurisdiction if it were to try criminal defendant in violation of his rights under the Colorado speedy trial statute and the rules of the Colorado supreme court. *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980).

Determination of denial of speedy trial is judicial question. The question of determining when an accused has been denied a speedy trial under this rule, or under the constitution, is necessarily a judicial question. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

Appealability. Where determination that delays in bringing defendant to trial involved resolutions of fact questions, the district attorney could not appeal such determinations. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Speedy public trial is a relative concept requiring judicial determination on a case-by-case basis. *Lucero v. People*, 171 Colo. 167, 465 P.2d 504 (1970).

Determined by circumstances of each case. A speedy public trial is a relative concept, because the circumstances of each case determine whether it has been afforded. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

The circumstances of each case must be examined to determine whether a speedy trial has been afforded, and in making this determination the court must consider the length of the pretrial delay, the reasons for it, whether the defendant has demanded a speedy trial, and whether any prejudice actually resulted to the defendant. All of these factors are interrelated and must be considered together with any other relevant circumstances. *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

Such as defendant's understanding of when six-month period begins to run. Where defendant's expressed understanding was that the six-month period of the speedy trial statute would commence to run at the end of his continuance, the failure to try defendant within six

months of the granting of the continuance does not entitle him to dismissal of charges. *Baca v. District Court*, 198 Colo. 486, 603 P.2d 940 (1979).

The speedy trial statute (§ 18-1-405) is intended to implement the constitutional right to a speedy trial by requiring dismissal of the case whenever the defendant is not tried within the six-month period and the delay does not qualify for one of the express exclusionary categories set out in the statute. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Section (b) and § 18-1-405 are virtually identical. Since section (b) of this rule is the procedural counterpart to the speedy trial statute and is virtually identical to § 18-1-405, the resolution of a speed trial issue if the same whether the analysis proceeds from the statute or the rule. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Section 18-1-405 refers to trial resolving ultimate guilt or innocence. The phrase "brought to trial on the issues raised by the ... information", as used in § 18-1-405, refers to a trial which resolves the ultimate guilt or innocence of the accused as to the charges filed against him and not a sanity trial, even when the defendant pleads not guilty by reason of insanity. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

And commencement of a sanity trial is not the functional equivalent of a trial on the merits for purposes of satisfying the state's speedy trial obligation. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Constitutional right to speedy trial not controlled by six-month statutory period. A defendant is not precluded from asserting her constitutional right to a speedy trial simply because the trial was held within the required statutory period; the defendant, however, has the burden of proving that her constitutional speedy trial right has been denied. *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

Simply because a trial is held within six months, the defendant is not precluded from raising his right to a speedy public trial as embodied in § 16 of art. II, Colo. Const. *Casias v. People*, 160 Colo. 152, 415 P.2d 344, cert. denied, 385 U.S. 979, 87 S. Ct. 523, 17 L. Ed. 2d 441 (1966).

For the six-month proscription of this rule defines the outside limits for prosecution. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

This rule is not a statement of the minimum time that must expire before a defendant can look for relief for denial of a speedy trial. *People v. Mayes*, 178 Colo. 429, 498 P.2d 1123 (1972).

The six-month provision sets up a maximum limitation beyond which a defendant shall not be tried for the offense charged, provided the delay was not occasioned by his action or re-

quest. *Casias v. People*, 160 Colo. 152, 415 P.2d 344, cert. denied, 385 U.S. 979, 87 S. Ct. 523, 17 L. Ed. 2d 441 (1966).

Prejudice to the defendant could dictate that a case be dismissed for failure to grant a speedy trial, even though the six-month period set forth in the rule has not expired. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

Six-month limitation begins to run. The six-month limitation of both § 18-1-405 and section (b)(1) of this rule runs from the date that defendant's plea is entered. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Subsection (b)(1) plainly requires that the defendant be brought to trial within six months of the date upon which he enters a plea of not guilty to the charges set forth in the information. *People v. Romero*, 196 Colo. 520, 587 P.2d 789 (1978).

The six-month period commences upon the arraignment for the last information. *People v. Dunhill*, 40 Colo. App. 137, 570 P.2d 1097 (1977).

The six-month period, provided for in section (b), commences to run upon the defendant's arraignment on the last of three informations where two prior informations have been dismissed. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

Record to show compliance. The burden of establishing compliance with the speedy trial statute includes making a record sufficient for an appellate court to determine such statutory compliance. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

Court cannot dismiss on own motion. Where defendant and counsel failed to appear at trial date, this rule does not authorize a district court, on its own motion, to dismiss a criminal case over the district attorney's objection, even though it appears that further prosecution will be useless and unnecessarily costly. *People v. Hale*, 194 Colo. 503, 573 P.2d 935 (1978).

Speedy trial requirements apply in juvenile proceedings. Trial courts are bound by the statutory and constitutional speedy trial requirements in juvenile as well as adult proceedings; fundamental fairness requires no less. *P.V. v. District Court*, 199 Colo. 357, 609 P.2d 110 (1980).

A trial court conducting a juvenile proceeding is bound by the same statutory and constitutional speedy trial requirements that are applicable in adult proceedings. *People in Interest of T.F.B.*, 199 Colo. 474, 610 P.2d 501 (1980).

But not in trial de novo for violation of ordinance. Six-month speedy trial rule does not apply in a trial de novo in the county court for violation of a municipal ordinance. *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Special time limitations of § 24-60-501 prevail, when conflicts arise, over the more

general criminal procedure provisions of § 18-1-405 and this rule. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

Defendant must enter plea before he may take advantage of the restriction of § 18-1-405 and subsection (b) (1) of this rule. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Where no plea has been entered, there has been no violation of the rule. *Potter v. District Court*, 186 Colo. 1, 525 P.2d 429 (1974).

Defendant only required to move for dismissal. The burden of insuring compliance with the time requirements of section (b) is on the prosecution and the trial court, to the point that the only affirmative action required on the part of the defendant is that he move for a dismissal prior to trial. *People v. Abeyta*, 195 Colo. 338, 578 P.2d 645 (1978).

To properly raise the question, the accused may apply for his discharge or for dismissal for lack of a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

And must show he was not afforded speedy trial. A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused, as he has the burden of showing that he was not afforded a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

The burden is upon the defendant to show that an expeditious trial was denied him. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969); *Ziatz v. People*, 171 Colo. 58, 465 P.2d 406 (1970).

The burden is upon the defendant to establish that he has been denied a speedy trial in violation of the statute or rule or that his constitutional right to a speedy trial requires dismissal. *Saiz v. District Court*, 189 Colo. 555, 542 P.2d 1293 (1975); *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Although there is considerable delay in bringing the defendants to trial, such is immaterial where it is still accomplished within the six-month requirement, and defendants fail to meet the burden of showing they were denied an expeditious trial, and that they were prejudiced thereby. *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), cert. denied, 393 U.S. 1108, 89 S. Ct. 918, 21 L. Ed. 2d 804 (1969).

Although not because bail is granted. The right to a speedy trial is not dissipated by the fact that the defendant is granted bail. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

Consistent with court's trial docket. The burden is upon defendant who asserts denial of speedy trial to show facts establishing that, consistent with court's trial docket conditions, he could have been afforded trial. *Rowse v. District Court*, 180 Colo. 44, 502 P.2d 422 (1972).

As a speedy trial envisions a public trial consistent with the court's business. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

The constitutional right to a speedy trial means a trial consistent with the court's business. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972).

And not immediately after apprehension and indictment. Speedy public trial does not mean trial immediately after the accused is apprehended and indicted, but public trial consistent with the court's business. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

Congestion of docket must be considered. One circumstance to be considered in determining whether the defendant received a speedy trial is the extent of congestion of the docket of the trial court. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

Although it is clear that docket congestion would not warrant a retrial later than the three-month maximum period for delay caused by a mistrial, it is a factor in determining the reasonableness of the delay within the statutory and procedural time periods of § 18-1-405 (6)(e) and section (b)(6)(V) of this rule. Pinelli v. District Court, 197 Colo. 555, 595 P.2d 225 (1979).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. Hills v. Westminster Mun. Court, 245 P.3d 947 (Colo. 2011).

Delays which are occasioned by a district attorney are to be considered by a trial court in determining whether defendant had been denied his constitutional right to a speedy trial. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972).

Deliberate election of district attorney to postpone trial is denial. Where the facts clearly establish that a defendant was denied a speedy trial through no fault of his own and as a result of the deliberate election of the district attorney to postpone the trial, the defendant has been denied a speedy trial under the provisions of section (b) of this rule. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Delay caused by change of venue. When a change of venue is granted after arraignment, it is incumbent upon the prosecuting attorney to make a motion to obtain additional time to bring the defendant to trial because of the exceptional circumstances of the case, and the trial court must then make specific findings with respect to the justification. People v.

Colantonio, 196 Colo. 242, 583 P.2d 919 (1978).

State cannot dismiss and refile charges indiscriminately and avoid the mandate of this rule. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

The prosecution cannot indiscriminately dismiss and refile charges in order to avoid the mandate of § 18-1-405 and section (b)(1) of this rule. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

And subsequent indictment charging same offense must be dismissed. Where defendant was charged with an offense in one indictment and was subject to jurisdiction of court for more than one year, a subsequent indictment charging the defendant with same offense had to be dismissed for lack of speedy trial. Rowse v. District Court, 180 Colo. 44, 502 P.2d 422 (1972).

Provided defendant proves prosecution's course of action. To be entitled to dismissal on these grounds, the defendant must affirmatively establish the existence of such a course of action on the part of the prosecution. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

The burden of establishing that the prosecution indiscriminately dismissed and refiled charges in order to avoid the mandate of § 18-1-405 and section (b)(1) of this rule is not satisfied by proof only that the district attorney sought and obtained a subsequent indictment for different offenses arising from the same transaction. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

But where actions of district attorney in refiling are result of change in circumstances which justify that action, no violation of this rule occurs. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

As where federal sanctions are nullified after state action is dismissed. Where the district attorney was acting for the benefit of the defendant when he dismissed the original information based on the assumption that the defendant should not be punished twice for the same transaction, then when it becomes apparent that the defendant is to escape federal sanctions by reason of a technical objection, it is certainly proper for the district attorney to refile the state charges, and the actions of the district attorney are within the spirit of this rule. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

Effect of prosecution's filing amended complaint. When the prosecution files an amended complaint charging new material after the defendant's initial guilty plea, the period of time for dismissal under the speedy trial provisions is measured from the second guilty plea unless the prosecution has shown bad faith in amending the complaint. If the amended complaint does not charge new material, the time period is measured from the original guilty plea.

Amon v. People, 198 Colo. 172, 597 P.2d 569 (1979).

Mistrials due to prosecutor's actions not treated differently. Neither subparagraph (b)(6)(V) of this rule nor § 18-1-405 (6)(e), treats mistrials due to the prosecutor's actions differently from mistrials due to other reasons. People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

For purposes of six-month period, new trial order similar to reversal. A new trial order pursuant to a new trial motion is similar to a reversal on appeal for purposes of the speedy trial provisions and results in a six-month speedy trial period. People v. Jamerson, 196 Colo. 63, 580 P.2d 805 (1978).

Failure to demand dismissal waives speedy trial objection. Failure to bring defendant to trial within the allotted time does not automatically deprive the trial court of jurisdiction, because defendant's failure to demand dismissal prior to trial waives any speedy trial objection. People v. Anderson, 649 P.2d 720 (Colo. App. 1982).

In accordance with the express language of § 18-1-405 (5), defendant waived his right to a speedy trial by failing to move for dismissal of charges prior to entering a guilty plea. This did not, however, automatically waive the defendant's constitutional right to a speedy trial. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Delay caused by briefing and determining defendant's motion to dismiss properly charged to defendant. Williamsen v. People, 735 P.2d 176 (Colo. 1987).

Determination that delay was caused by substitution of counsel not supported by record and not properly chargeable to defendant. Defendant's actions did not require a substitution of counsel, he was not counseled by the court on a need for a continuance, and court did not attempt to find other counsel who could meet the deadline. People ex rel. Gallagher v. District Court, 933 P.2d 583 (Colo. 1997).

Express waiver or other affirmative conduct evidencing a waiver of the right to a speedy trial must be shown before a trial court may deny a dismissal motion. People v. Gallegos, 192 Colo. 450, 560 P.2d 93 (1977); Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977); People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978).

Mere silence by a defense counsel to a trial setting beyond the speedy trial period shall not be construed as a waiver of a defendant's right to a speedy trial. Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977); People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978); People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Defendant's waiver limited. Where petitioner moved to continue his arraignment date,

his written motion contained a statement to the effect that "the defendant waives his right to a speedy trial", this statement was intended only as a waiver of the right to challenge any speedy trial violation caused by the request for a continuance of the arraignment date and was not effective with respect to any subsequently occurring statutory speedy trial violation. Sweet v. Myers, 200 Colo. 50, 612 P.2d 75 (1980).

Failure of each defendant to interpose any objection to a trial setting in county court beyond the six-month speedy trial period did not waive his right to a speedy trial. Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977).

Waiver after six-month period questionable. It is questionable whether a waiver of the right to a dismissal for failure to be granted a speedy trial could ever occur after the right to dismissal has already accrued. People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978).

Presence of defendant or counsel for subdivision (b)(6)(VII)(A) continuance. It is not clear under subdivision (b)(6)(VII)(A) of this rule whether the presence of the defendant or his counsel in open court is required. People v. Baker, 38 Colo. 101, 556 P.2d 90 (1976).

Showing required by subdivision (b)(6)(VII)(A). Subdivision (b)(6)(VII)(A) requires a showing not only that the evidence is material and unavailable but also that the prosecuting attorney has exercised due diligence to obtain it. People v. Baker, 38 Colo. 101, 556 P.2d 90 (1976).

C. Exclusion of Periods of Delay.

Exclusion of delay caused by defendant. This rule excludes delay which is caused by, agreed to, or created at the instance of the defendant. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975).

Where the delay has been initially caused by the defendant, he cannot invoke this rule. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

A defendant is not entitled to be discharged if he requests a postponement of his trial or otherwise causes the delay. People v. Bates, 155 Colo. 277, 394 P.2d 134 (1964).

Where attributable to affirmative action by defendant. In computing the time within which a defendant must be brought to trial, in order for the delay to be charged to the defendant, it must be attributable to affirmative action on defendant's part, or to defendant's express consent to the delay, or to other affirmative conduct evidencing such consent. Tassett v. Yeager, 195 Colo. 190, 576 P.2d 558 (1978).

An express consent to the delay or other affirmative conduct evidencing such consent must be shown before the delay is chargeable to

the defendant. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

Since the six-month provision of this rule is conditioned upon the proposition that the delay is not caused by the action or request of the defendant. *Lucero v. People*, 171 Colo. 167, 465 P.2d 504 (1970).

Factors authorized a continuance and thereby extended the speedy trial time where a period of delay was attributable to the inability of the prosecution, despite its exercise of due diligence, to obtain the victim's presence for trial and prosecution demonstrated the victim would be available to testify at a later date. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Period of delay was excluded from the speedy trial period under the provisions of subsection (b)(6)(III). The trial court did not abuse its discretion in refusing to grant a severance, therefore the continuance granted to the codefendant was chargeable to the defendant, and the defendant was not denied his right to a speedy trial. *People v. Backus*, 952 P.2d 846 (Colo. App. 1998).

Exclusion applies to entire period fairly attributed to absence. The exclusion provision applicable to the defendant's voluntary absence or unavailability applies to the entire period of delay that may be fairly attributed to such absence. *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Gray*, 710 P.2d 1149 (Colo. App. 1985).

Defendant confined to mental institution. When a defendant is confined to a mental institution or hospital for observation or examination prior to a determination of mental competency, he cannot complain of a denial of his constitutional right to a speedy trial because of the delay occasioned by that confinement. *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), *aff'd in part, rev'd in part on other grounds*, 711 P.2d 1270 (Colo. 1986).

Excludable period may be longer than period of absence. The excludable period of delay resulting from defendant's absence, may, in some cases, be longer than merely the period of defendant's absence. *People v. Alward*, 654 P.2d 327 (Colo. App. 1982), *cert. dismissed*, 677 P.2d 948 (Colo. 1984).

The period between a mistrial and commencement of a completed trial is properly excludable from the statutory speedy trial period requirement. *People v. Martinez*, 712 P.2d 1070 (Colo. App. 1985).

Short delay is of no consequence where there have been numerous appearances already. The record is devoid of any showing that the trial was not held as soon as consistent with the court's business or that defendant suffered any prejudice by reason of the short delay when, between the date of charge and the date of trial, defendant, with his counsel, made nu-

merous appearances in court to dispose of various pretrial matters. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

Prearrest delay excluded from computation. Subsection (b)(1) supports a motion to dismiss only when the delay occurs after charges are made or an arrest has been effected and is not directed to delay which transpires prior to arrest. *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975).

Where a complaint was filed against defendant and a warrant for his arrest was issued, but there was no evidence that defendant was in the county during the period between the complaint and his arrest, the defendant was not entitled to a dismissal under this rule. *People v. Tull*, 178 Colo. 151, 497 P.2d 3 (1972).

Period tolled by defendant's failure to make court appearance. When a defendant fails to make a scheduled bond appearance before the trial court, the six-month speedy trial period is tolled until he makes himself available to the court, even where some of time that he is unavailable he is incarcerated in another jurisdiction. *People v. Moye*, 635 P.2d 194 (Colo. 1981).

Where defendant's criminal behavior causes him to be in the penitentiary when his case is set for trial, the delay that occurs cannot be interpreted to be a violation of his constitutional rights. *Scott v. People*, 176 Colo. 289, 490 P.2d 1295 (1971).

Period of delay caused by mistrial not included. The computation of the six-month period allowed for in section (b)(1) shall not include any period of delay caused by a mistrial, nor the extension provided following a mistrial, being part of the delay caused thereby. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

The length of delay "caused by any mistrial" must be calculated to include the days on which the aborted trial or trials were in progress. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

Three-month exclusion following mistrial. Section 18-1-405(6)(e) and subdivision (b)(6)(V) of this rule grant the prosecution a three-month exclusion in which to retry a case after a mistrial, provided that the delays are reasonable. *People v. Pipkin*, 655 P.2d 1360 (Colo. 1982); *Mason v. People*, 932 P.2d 1377 (Colo. 1997).

The general assembly intended to grant no more than three months as an exclusion from the speedy trial period, which is one-half of the statutory speedy trial period, following a mistrial. *People v. Pitkin*, 655 P.2d 1360 (Colo. 1982).

Whether jeopardy has attached is irrelevant. If the court is forced to dismiss the jurors, or prospective jurors, and reschedule the trial, whether jeopardy has yet attached is irrelevant

in computing the length of delay excluded due to mistrial. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

Where continuances requested to effect plea bargain. A defendant was not denied a speedy trial when the trial was held more than one year after he was charged where the delay was occasioned, to a large extent, by the defendant who requested and obtained numerous continuances in an attempt to effectuate a plea bargain. *Maynes v. People*, 178 Colo. 88, 495 P.2d 551 (1972).

Speedy trial period tolled by appeal. The period of time necessary to go through the appellate process, where the appeal stems from a dismissal upon the defendant's motion, tolls the statutory speedy trial period. *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979).

This rule excludes from the computation of the time for speedy trial purposes the period of delay caused by an interlocutory appeal, but an original proceeding under C.A.R. 21 is, technically speaking, not an interlocutory appeal. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

And for filing of psychiatric reports. When a defendant pleads not guilty by reason of insanity, the period from the time of commitment until the filing of the final psychiatric report, if filed within a reasonable time, is excludable for purposes of the six-month period. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

The defendant need not be committed to an institution for examination before a reasonable time can be excluded from the speedy trial computation for the filing of psychiatric reports. *People v. Brown*, 44 Colo. App. 397, 622 P.2d 573 (1980).

Tactical decision to seek continuance chargeable to defendant, absent prosecutor's

bad faith. For purposes of section (b), a tactical decision to seek a continuance is chargeable to the defendant in the absence of a showing of bad faith on the part of the prosecutor. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

In the absence of a showing of bad faith on the part of the prosecutor in endorsing a witness on the day of the trial, the delay resulting from the defendant's tactical decision to seek a continuance as a result of the late endorsement is chargeable to her. *People v. Steele*, 193 Colo. 87, 563 P.2d 6 (1977).

Defense counsel's action held tantamount to request for continuance. When defense counsel insists he could not try the case prior to expiration of the six-month speedy trial period, this is tantamount to a request for a continuance. *People v. Chavez*, 650 P.2d 1310 (Colo. App. 1982).

Counsel may obtain continuance without defendant's consent. Defendant's attorney, without defendant's personal consent, may obtain a continuance of a trial setting subject to the discretion of the trial court, and the continuance will extend the speedy trial deadline an additional six months from the granting of the continuance. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Defendant's speedy trial rights were not violated when, in response to the testimony of defendant's mental health expert during a suppression hearing that defendant's statements were involuntary because of a mental disorder, prosecution requested, and was granted, three month continuance in order to arrange for expert testimony and analyze the alleged mental disorder. *People v. Whalin*, 885 P.2d 293 (Colo. App. 1994).

Rule 49. Service and Filing of Papers

(a) **Service — When Required.** Written motions other than those which are heard ex parte, written notices, and similar papers shall be served upon the adverse parties. A motion or other pleading that includes a claim alleging a state statute or municipal ordinance is unconstitutional shall also be served upon the Attorney General.

(b) **Service — How Made.** Whenever under these Rules or by court order service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for civil actions unless otherwise ordered by the court.

(c) **Notice of Orders.** Immediately upon entry of any order made out of the presence of the parties after the information or indictment is filed, the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket.

Source: (a) amended and effective October 18, 2007.

Cross references: For the manner of service in civil actions, see C.R.C.P. 5.

ANNOTATION

Reversal of verdict on the basis of failure to disclose certain information to the defendant is mandated only where the information might have affected the outcome of the trial. However, failure of prosecution to give notice to defendant of grants of immunity to two witnesses was not reversible error in that the ex

parte order was available to the defense counsel in court records and there was nothing to indicate that the defense counsel's lack of knowledge regarding the grants of immunity might have in any way prejudiced the defendant so as to have affected the outcome of the trial. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

Rule 50. Calendars

The courts of record may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings.

Rule 51. Exceptions Unnecessary

Exceptions to ruling or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the court ruling or order is made or sought, makes known to the court the action which he desires the court to take or his objection to the court's action and the grounds therefor. But if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

ANNOTATION

Allegation of prejudice gives standing for review, regardless of lack of objection. A defendant's claim that the trial court's ruling adversely affected the exercise of his right to testify in his own defense alleges sufficient prejudice to give him standing to seek review of that ruling, whether or not he objected when the ruling was made. *People v. Evans*, 630 P.2d 94 (Colo. App. 1981).

Court must allow contemporaneous objections to evidence and the court's rulings. Without a contemporaneous record of the grounds that a party stated at the time of a objection, disputes as to the grounds asserted for error may arise. *Jones v. District Court*, 780 P.2d 526 (Colo. 1989).

Applied in *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Rule 52. Harmless Error and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ANNOTATION

- I. General Consideration.
- II. Harmless Error.
- III. Plain Error.

I. GENERAL CONSIDERATION.

Law reviews. For article, "United States Supreme Court Review of Tenth Circuit Decisions", which discusses attorney misconduct as harmless error, see 63 Den. U. L. Rev. 473 (1986). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a recent case relating to harmless error, see 15 Colo. Law. 1616 (1986). For article, "Standards

of Appellate Review in State Versus Federal Courts", see 35 Colo. Law. 43 (April 2006).

Applied in *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968); *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968); *Wiseman v. People*, 179 Colo. 101, 498 P.2d 930 (1972); *Scott v. People*, 179 Colo. 126, 498 P.2d 940 (1972); *People v. Baca*, 179 Colo. 156, 499 P.2d 317 (1972); *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972); *People v. Spinuzzi*, 184 Colo. 412, 520 P.2d 1043 (1974); *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975); *People v. McClure*, 190 Colo. 250, 545 P.2d 1038 (1976); *People v. LeFebvre*, 190 Colo.

307, 546 P.2d 952 (1976); *People v. Bastardo*, 191 Colo. 521, 554 P.2d 297 (1976); *Chandler Trailer Convoy, Inc. v. Rocky Mt. Mobile Home Towing Servs., Inc.*, 37 Colo. App. 520, 552 P.2d 522 (1976); *People v. Brionez*, 39 Colo. App. 396, 570 P.2d 1296 (1977); *People v. Thorpe*, 40 Colo. App. 159, 570 P.2d 1311 (1977); *People v. Stitt*, 40 Colo. App. 355, 575 P.2d 446 (1978); *People v. Taylor*, 191 Colo. 161, 591 P.2d 1017 (1979); *People v. Reyes*, 42 Colo. App. 73, 589 P.2d 1385 (1979); *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979); *People v. Davenport*, 43 Colo. App. 41, 602 P.2d 871 (1979); *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980); *People v. Smith*, 620 P.2d 232 (Colo. 1980); *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980); *People v. Massey*, 649 P.2d 1112 (Colo. App. 1980), *aff'd*, 649 P.2d 1070 (Colo. 1982); *People v. Nisted*, 653 P.2d 60 (Colo. App. 1980); *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Padilla*, 638 P.2d 15 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Founds*, 631 P.2d 1166 (Colo. App. 1981); *People v. Dillon*, 633 P.2d 504 (Colo. App. 1981); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Handy*, 657 P.2d 963 (Colo. App. 1982); *People v. Jones*, 665 P.2d 127 (Colo. App. 1982); *People v. Hart*, 658 P.2d 857 (Colo. 1983); *People v. Cisneros*, 665 P.2d 145 (Colo. App. 1983); *People v. Priest*, 672 P.2d 539 (Colo. App. 1983); *People v. Beasley*, 683 P.2d 1210 (Colo. App. 1984); *Callis v. People*, 692 P.2d 1045 (Colo. 1984); *People v. Armstrong*, 704 P.2d 877 (Colo. App. 1985); *Williams v. People*, 724 P.2d 1279 (Colo. 1986); *People v. Wiegard*, 727 P.2d 383 (Colo. App. 1986); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986); *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988), *cert. granted*, 783 P.2d 838 (Colo. 1989), *cert. denied*, 805 P.2d 1116 (Colo. 1991); *People v. Schuett*, 833 P.2d 44 (Colo. 1992); *People v. Corpening*, 837 P.2d 249 (Colo. App. 1992); *People v. Ornelas*, 937 P.2d 867 (Colo. App. 1996); *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997); *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

II. HARMLESS ERROR.

No reversal where insufficient error. Where there is no error of sufficient magnitude, reversal of judgment of conviction is not required. *Early v. People*, 178 Colo. 167, 496 P.2d 1021 (1972).

Harmless, constitutional error. The admission of an in-court identification without first determining that it is not tainted by an illegal lineup but is of independent origin may be constitutional error; but such error may be consid-

ered harmless even if there has been an illegal lineup confrontation, if the identification witness makes an in-court identification based on sufficient independent observations of the defendant, disassociated from the pretrial lineup. *Espinoza v. People*, 178 Colo. 391, 497 P.2d 994 (1972).

Constitutional errors may be characterized as harmless only when the case against a defendant is so overwhelming that the constitutional violation is harmless beyond a reasonable doubt. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983); *People v. Jensen*, 747 P.2d 1247 (Colo. 1987); *Topping v. People*, 793 P.2d 1168 (Colo. 1990); *People v. Denton*, 91 P.3d 388 (Colo. App. 2003); *People v. Delgado-Elizarras*, 131 P.3d 1110 (Colo. App. 2005).

Before an error affecting a defendant's constitutional right to testify in his own behalf can be deemed harmless, an appellate court must determine beyond a reasonable doubt that the error did not contribute to the verdict. *People v. Evans*, 630 P.2d 94 (Colo. App. 1981); *Crespin v. People*, 721 P.2d 688 (Colo. 1986); *Topping v. People*, 793 P.2d 1168 (Colo. 1990).

Absence of defense counsel at critical stage of proceedings, which is a constitutional error, can be harmless if the error is a "trial error" that can be quantitatively assessed on appellate review as opposed to "structural defect" that affects the framework within which the trial proceeds. *Key v. People*, 865 P.2d 822 (Colo. 1994).

The standard for harmless error is the prosecution must show that the error did not contribute to a defendant's conviction. If there is reasonable probability from review of the entire record that a defendant could be prejudiced the error is not harmless. *Key v. People*, 865 P.2d 822 (Colo. 1994).

An ex parte scheduling conference with jurors during deliberations occurred at a critical stage of the criminal proceedings and was not harmless error. *Key v. People*, 865 P.2d 822 (Colo. 1994).

Markings from codefendant's trial on exhibits harmless. Fact that certain exhibits used in defendant's trial had court reporter's identification marks on them remaining from their use in the codefendant's trial, did not result in any prejudice and, at most, the marks constituted harmless error which is not ground for reversal. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

As may be use of void prior convictions for impeachment. The error implicit in the use of void prior convictions for impeachment purposes need not necessarily require reversal, particularly where the error is found to be harmless beyond a reasonable doubt. *People v. Neal*, 187 Colo. 12, 528 P.2d 220 (1974).

Or failure to properly instruct jury. Where jury instruction failed to include an essential

part of the two-witness rule in prosecution for perjury, i.e., that the corroborating evidence must be deemed of equal weight to the testimony of another witness, this omission was harmless error inasmuch as there was direct testimony by three witnesses contradicting the defendant's grand jury testimony. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Where the admissions of a defendant as either extrajudicial statements or a confession is not an issue of significance, the giving of an instruction on them is not grounds for relief. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Where one is benefited by an error in submitting or failing to submit an instruction, he cannot claim prejudicial error. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Where evidence of a petty offense by defendants is introduced during a felony trial, the trial judge should instruct the jury as to its limited purpose, but his failure to do so is harmless error, considering the nature of the petty offense as compared with the gravity of the charge against the defendants. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Where a court errs in giving an instruction that prejudices the state rather than the defendant in that it increases the state's burden beyond that required, no grounds for reversal are created. *Early v. People*, 178 Colo. 167, 496 P.2d 1021 (1972).

While it is unnecessary and poor practice to give the jury a separate instruction on the credibility of a defendant as a witness, the giving of such an instruction does not constitute reversible error. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

Where there is overwhelming evidence of the defendant's deliberation in a first degree murder case, the use of an outmoded jury instruction on the law of deliberation is harmless error. *People v. Key*, 680 P.2d 1313 (Colo. App. 1984).

Inclusion of allegation of aggravation in jury instruction for simple robbery charge which was basis of felony murder charge constituted harmless error as instruction inured to benefit of defendant. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Or admission of challenged statement. Where the defendant's substantial rights were not affected by the admission into evidence of a challenged statement, no reversible error occurs. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Or improper questioning concerning co-conspirator's guilty plea. While a prosecutor should not elicit testimony concerning a coconspirator's guilty plea, when the evidence of a defendant's guilt is overwhelming, reference to the guilty plea is harmless error, especially when defense counsel questions the witness about this guilty plea in an effort to impeach his

credibility. *People v. Craig*, 179 Colo. 115, 498 P.2d 942, cert. denied, 409 U.S. 1077, 93 S. Ct. 690, 34 L. Ed. 2d 666 (1972).

Or error in admitting testimony of codefendant. Error, if any, in admitting testimony as to admissions which were made by codefendant who under prosecution theory was principal perpetrator of robbery and murder that constituted basis for first-degree murder charge of defendant as an accessory, which indicated that another person was present and the admission of which allegedly violated defendant's sixth amendment right of confrontation was harmless, where additional evidence consisting of testimony of three eyewitnesses also established that the robbery was committed by two men. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

It is not reversible error to admit evidence concerning a description of defendants just because it is testimony of a codefendant as to whom the severance has been granted, thereby operating so as either to deprive defendants of an opportunity to cross-examine or to require a waiver of the benefits of a severance to which they are entitled, where in view of the inconclusive nature of the identification, it cannot be said that there is any prejudice to the defendants from the admission of this evidence, although it would clearly be a better procedure to conceal the source of the extrajudicial identifications. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Failure to grant continuance or mistrial where witness fails to appear held harmless error. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Failure to provide definition of "custody" and "confinement" to the jury was harmless error under the circumstances portrayed by the record. A trial court is under an obligation to instruct the jury properly, and a failure to do so as to every element of a crime charged is error. However, the lack of instruction by the court as to the meanings of "custody" and "confinement" inured to the defendant's benefit and thus the instructional failure here constituted harmless error. *People v. Atkins*, 885 P.2d 243 (Colo. App. 1994).

Failure to grant motion for mistrial not an abuse of discretion where trial court sustained defendant's objection to question suggesting prior criminal conduct, defendant did not request that a curative instruction be given to the jury and none was given, and no substantial prejudice to defendant was demonstrated. *People v. Talley*, 677 P.2d 394 (Colo. App. 1983).

Improper admission of defendant's refusal to sign a written Miranda advisement held harmless error. *People v. Mack*, 638 P.2d 257 (Colo. 1981).

Improper admission of evidence to which hearsay exceptions did not apply held harm-

less error since the admission did not contribute to defendant's conviction, nor did it prejudice the proceedings. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

When misstatements at trial do not require reversal. Where misstatements do not so infect the trial as to require more than an admonition given to the jury by the trial judge in the exercise of his discretion and no motion for mistrial on these grounds is made at the time of the statements, there are not substantial grounds for reversal. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Nor improper argument by prosecutor. A prosecutor's argument is not prejudicial and does not require reversal when the trial judge tells the prosecution to terminate the line of argument and instructs the jury that argument is not evidence. *People v. Motley*, 179 Colo. 77, 498 P.2d 339 (1972).

Attorney prohibited from characterizing a witness's testimony or his character for truthfulness with any form of the word "lie". A violation of this prohibition, although sanctionable in other ways, does not warrant reversal if it was harmless. *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005); *Crider v. People*, 186 P.3d 39 (Colo. 2008).

Prosecutor prohibited from making generic tailoring arguments, which are improper because they are not based on reasonable inferences from evidence in the record. *Martinez v. People*, 244 P.3d 135 (Colo. 2010).

Prosecutor's closing argument that defendant who testified at trial had an opportunity to listen to all of the testimony and tailor his testimony to fit that of other witnesses improper. *Martinez v. People*, 244 P.3d 135 (Colo. 2010).

Prosecutor's generic tailoring comments harmless, however, because defendant commented on and expressly incorporated testimony of prior witnesses and because of substantial evidence calling into question defendant's credibility. No reasonable probability existed that prosecutor's generic tailoring argument, even though improper, influenced jury's determination of defendant's credibility or guilt. *Martinez v. People*, 244 P.3d 135 (Colo. 2010).

Nor giving of stock instruction. The giving of a stock instruction on the presumption of innocence does not constitute reversible error just because of its historical use. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

Nor failure to allow examination of grand jury testimony. The failure of a trial judge to grant a defendant and his counsel the right to examine grand jury testimony is not reversible error. *Robles v. People*, 178 Colo. 181, 496 P.2d 1003 (1972).

Nor inclusion of hearsay. The admission of a death certificate containing the statement that

the victim was "helping neighbor investigate burglary of neighbor's store and was shot by one of the burglars during this investigation" is not reversible error, particularly when the court later instructs the jury to ignore that portion of the certificate, although it would be much better practice to delete such included hearsay. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Even if extrajudicial identifications are inadmissible hearsay, when in light of the other material evidence relating defendants to the crime, such identification is clearly cumulative, and any error is harmless. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Nor verbal slip by judge. A defendant is not prejudiced by the trial judge's use of the word "offense" when the judge gives the jury a cautionary oral instruction at the time evidence of another transaction is introduced, and it is not reversible error. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Nor failure to administer an oath or affirmation of true translation to interpreter. *People v. Avila*, 797 P.2d 804 (Colo. App. 1990).

Nor failure to conduct a hearing on the admissibility of scientific evidence. Where DNA evidence relates solely to similar transaction evidence, the admission of such evidence, absent a preliminary hearing on its admissibility, is harmless error. *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992).

Nor failure to swear jury prior to beginning of testimony where jury sworn before deliberations. *People v. Clouse*, 859 P.2d 228 (Colo. App. 1992).

Nor where comment on defendant's failure to testify. A comment by the district attorney on defendant's failure to testify was not prejudicial enough to warrant reversal because the trial court properly instructed the jury that the defendant's failure to testify cannot be considered as evidence of guilt or innocence and it is generally accepted that defense counsel may by improper argumentative comment open the door to a response by the prosecuting attorney. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

When the prosecution calls oblique attention to the possible silence of the defendant, but does not make direct reference to the defendant's silence, there is error, but not reversible error. *People v. Calise*, 179 Colo. 162, 498 P.2d 1154 (1972).

Nor admission of defendant's mug shot. Where the evidence of guilt is substantial, the sole error of admitting the defendant's mug shot does not, in and of itself, constitute reversible error. *People v. Bugarin*, 181 Colo. 57, 507 P.2d 879 (1973).

If testimony accompanying introduction of a mug shot does not imply that defendant has a past criminal history, the introduction of the mug shot does not necessitate the granting of a mistrial. *People v. Borghesi*, 40 P.3d 15 (Colo.

App. 2001), *aff'd* in part and *rev'd* in part on other grounds, 66 P.3d 93 (Colo. 2003).

Nor where material witness functions as officer of court. Where the court, over defendants' objection, allowed the sheriff, who was a material witness for the state, to take part in the conduct of the trial by daily calling the court to order as well as select a few prospective jurors on open venire and the court also refused to give an instruction to the effect that no particular weight was to be attached to the sheriff's testimony by reason of his court functions, but he was not placed in charge of the jury at any time, then reversible error was not committed, although it is a better practice not to permit a material witness to function as an officer of the court. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Nor limitation of cross-examination of defendant's coconspirator by refusing to allow inquiry into coconspirator's subjective understanding of his plea arrangement is not reversible error. *People v. McCall*, 43 Colo. App. 117, 603 P.2d 950 (1979), *rev'd* on other grounds, 623 P.2d 397 (Colo. 1981).

Variance between charge and proof held not fatal. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

Where transaction charged and the one proved are substantially the same, although not all those allegedly involved in conspiracy are found to have participated, and the object of conspiracy is proved as laid, variance is not reversible error as substantial rights of defendant are not affected. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

Witness' statement that defendant had been in jail several times held not prejudicial. *People v. Gallegos*, 179 Colo. 211, 499 P.2d 315 (1972).

Failure to record final arguments in a trial to the court is not prejudicial error. *People in Interest of B.L.M. v. B.L.M.*, 31 Colo. App. 106, 500 P.2d 146 (1972).

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. *Petit jury's* subsequent guilty verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

Prejudicial opening statement made in bad faith reversible. Error cannot be predicated upon opening statement of attorney as to what he expects to prove, although his statement is not completely supported by evidence adduced at trial, unless unsupported portion of statement was made in bad faith and was manifestly prejudicial. *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972).

Trial judge to determine effect of potentially prejudicial evidence on jury. The trial judge is in preeminent position to determine potential effects of allegedly prejudicial statements on jurors, and his judgment will only be overturned upon an abuse of discretion. *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972).

Where the judge examines the jury as to the effect certain knowledge would have upon their ability to render a fair and impartial verdict in a criminal proceeding and is satisfied that their ability would not be impaired, his denial of motion for mistrial is not an abuse of discretion and will not be disturbed on review. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Error may be rendered harmless and therefore become not reversible by subsequent proceedings in the case or by the result thereof. *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971).

A harmless error argument does not apply when the trial court erroneously disqualifies a defendant's retained counsel of choice. *Anaya v. People*, 764 P.2d 779 (Colo. 1988).

Since testimony implicated another person and not defendant, the testimony was not prejudicial to defendant. Any error in the admission of such testimony is harmless. *People v. Mapps*, 231 P.3d 5 (Colo. App. 2009).

Admission of testimony was harmless since it did not substantially influence the verdict or impair the fairness of defendant's trial. *People v. Mapps*, 231 P.3d 5 (Colo. App. 2009).

III. PLAIN ERROR.

Authority of appellate court to consider plain error. Section (b) permits an appellate court to consider an alleged error which was not brought to the attention of the trial court, if the error affects the substantial rights of the defendant and it is "plain error". *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978).

A trial error to which no objection is made is forfeited and, therefore, not reviewable. However, such errors can be reviewed for plain error, which means an error must be plain and must affect a substantial right of a party. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

If no contemporaneous objection to alleged prosecutorial misconduct is made at trial, subsection (b) limits appellate review to a determination of plain error. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Appellate court cannot correct an error pursuant to section (b) unless the error is clear under current law. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

If the law is unsettled at the time of trial, the plain error analysis will be conducted using the status of the law at the time of trial. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

"Plain error" means error both obvious and substantial and those grave errors which seriously affect substantial rights of the accused. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986); *People v. Roberts*, 738 P.2d 380 (Colo. App. 1986).

"Plain" is synonymous with "clear" or, equivalently, "obvious". *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

A plain error is an error seriously affecting substantial rights of the accused. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977); *People v. Constant*, 44 Colo. App. 544, 623 P.2d 63 (1980), *rev'd* on other grounds, 645 P.2d 843 (Colo. 1982); *People v. Green*, 759 P.2d 814 (Colo. App. 1988); *Harris v. People*, 888 P.2d 259 (Colo. 1995).

Only error which is obvious and grave can rise to the status of plain error. *People v. Mills*, 192 Colo. 260, 557 P.2d 1192 (1976); *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

Plain error is error which is "obvious and grave". *People v. Peterson*, 656 P.2d 1301 (Colo. 1983); *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

The proper inquiry in determining a harmless error question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings. *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

Plain error occurs when, after review of entire record, the error so undermined trial's fundamental fairness as to cast serious doubt on reliability of conviction. *People v. Kruse*, 839 P.2d 1 (Colo. 1992); *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992), *aff'd*, 876 P.2d 1236 (Colo. 1994); *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993); *Harris v. People*, 888 P.2d 259 (Colo. 1995); *People v. Kerber*, 64 P.2d 930 (Colo. App. 2002); *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004).

A plain error analysis requires a consideration of various factors including the strength of the evidence against the defendant, the posture of the defense, and any persistent, improper remarks by the defendant. *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004).

To meet the burden of plain error, there must be a reasonable possibility that the alleged error contributed to the defendant's conviction. *People v. Valdez*, 725 P.2d 29 (Colo. App. 1986), *aff'd*, 789 P.2d 406 (Colo. 1990).

No definition of plain error will fit every case, and each case must be resolved on the particular facts or laws which are in issue. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

Each case must be resolved on the particular facts and law at issue. *People v. Miller*, 37 Colo.

App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Each case in which it is argued that plain error has been committed must be resolved in light of its particular facts and the law that applies to those facts. *People v. Mills*, 192 Colo. 260, 557 P.2d 1192 (1976); *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

And reviewing court to determine existence of plain error. It is incumbent upon a reviewing court, from its own reading of the record, to determine whether "plain error" occurred. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

Even though raised for first time on appeal. Where plain error affecting substantial rights appears, an appellate court, in the interest of justice, may, and should, deal with it, even though it is raised for the first time on appeal. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972); *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974); *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Issues not properly preserved at trial can serve as a basis for reversal only if they involve plain error. *People v. Mattas*, 44 Colo. App. 139, 618 P.2d 675 (1980), *aff'd*, 645 P.2d 254 (Colo. 1982).

An error in trial proceedings to which the accused fails to make a contemporaneous objection will not support reversal unless it casts serious doubt upon the basic fairness of the trial. *Wilson v. People*, 743 P.2d 415 (Colo. 1987); *People v. Winters*, 765 P.2d 1010 (Colo. 1988); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989); *Woertman v. People*, 804 P.2d 188 (Colo. 1991); *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Where defendant did not object to use of photocopy, its use did not so undermine the fundamental fairness of trial as to cast serious doubt on the reliability of conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Because defendant did not object to a jury instruction at trial the court's action is reviewed pursuant to (b) under a plain error standard, with a finding of error only if review of the entire record demonstrates a reasonable possibility that the improper instruction contributed to the defendant's conviction. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

The court committed harmless error in failing to give the jury cautionary hearsay instructions after each hearsay witnesses' testimony. Three hearsay witnesses testified in sequence, the court gave the cautionary instruction following the testimony of the last hearsay witness and during the general charge to the jury, and the hearsay testimony corroborated the testimony of other witnesses. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994.)

If a defendant does not object to statements he feels are prejudicial, a plain error standard of review applies. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991); *People v. Mendez*, 897 P.2d 868 (Colo. App. 1995); *People v. Kerber*, 64 P.3d 930 (Colo. App. 2002).

No error where witness stated defendant was out of prison and that defendant had previously threatened him, where statements were part of the total picture surrounding the offense, the witness's description of defendant's threats were mentioned during defendant's cross-examination of witness, and defendant made no objections or mistrial motions. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

As long as a fundamental or substantial right has purportedly been violated. Although defendant's trial counsel did not make any contemporaneous objections nor raise the issue in his post-trial motion, an appellate court will consider, nevertheless, alleged error where it involves a fundamental right which has purportedly been violated. *Hines v. People*, 179 Colo. 4, 497 P.2d 1258 (1972).

Even though defendant's counsel neither tendered an instruction on the presumption of innocence nor objected to the court's failure to instruct the jury on the presumption of innocence, because the failure to instruct on the presumption of innocence affects such a substantial right, the supreme court may take cognizance of the error pursuant to section (b). *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

To constitute reversible error, the introduction of the statement of aggravating factors which was not objected to at trial must affect the substantial rights of a defendant. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Whether a defendant has received effective assistance of counsel is a question concerning a fundamental right. *Armstrong v. People*, 701 P.2d 17 (Colo. 1985).

Which is prejudicial. An appellate court will consider issues not raised below where serious prejudicial error was made and justice requires the consideration. *Larkin v. People*, 177 Colo. 156, 493 P.2d 1 (1972).

Effect of failure to object at trial. Where instructions used by the trial court failed to define the statutory terms, failure to object to the tendered instructions or raise any constitutional objection to the statute at the trial court level raises the standard of review to one of "plain error". *People v. Cardenas*, 42 Colo. App. 61, 592 P.2d 1348 (1979); *People v. Campbell*, 678 P.2d 1035 (Colo. App. 1983).

Where the issue is raised for the first time on appeal, review is confined to a consideration of whether the error falls within the definition of plain error. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

Where a defendant failed to object to the adequacy of the jury instructions in his motion for a new trial, a judgment will not be reversed unless plain error occurred. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

Failure to make timely and sufficient objection at trial prevents consideration of issue on appeal unless it involves plain error. *People v. Kruse*, 839 P.2d 1 (Colo. 1992).

Unless a prosecutor's misconduct is "glaringly or tremendously" improper, it is not plain error under section (b) where no objection to the behavior was raised. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

And review limited when issue not cited in motion for new trial. Where defense counsel objected to the admission of certain evidence, but failed to cite its admission in his motion for a new trial, it may not be considered on appeal unless the introduction of that evidence constituted plain error. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Reversal justified where error contributed to conviction. Only when there is at least a reasonable possibility that the action claimed to be plain error contributed to the defendant's conviction can it justify reversal. *People v. Aragon*, 186 Colo. 91, 525 P.2d 1134 (1974); *People v. Mills*, 192 Colo. 260, 557 P.2d 1192 (1976).

Unless there is a reasonable possibility that the alleged error contributed to defendant's conviction, reversal of the proceedings below is not required. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Where the minds of an average jury would not have found the prosecution's case significantly less persuasive by the elimination of the error and the evidence of guilt of the defendant is overwhelming, a defendant is not entitled to reversal based on plain error. *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972).

In order for the court to find plain error, there must be a reasonable possibility that an alleged erroneous instruction contributed to the defendant's conviction. The existence of this possibility must be determined by an examination of the particular facts of the case. *People v. Dillon*, 655 P.2d 841 (Colo. 1982).

Plain error affects substantial rights of the accused, and the record must demonstrate a reasonable possibility that the alleged erroneous instruction contributed to defendant's conviction. *People v. Cowden*, 735 P.2d 199 (Colo. 1987); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989).

Plain error is present only if an appellate court, after reviewing the entire record, can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judg-

ment of conviction. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Deprivation of affirmative defense deemed plain error. The contention that a defendant has been deprived of an affirmative defense, if meritorious, is plain error. *People v. Beebe*, 38 Colo. App. 80, 557 P.2d 840 (1976).

Improper testimony regarding the procedure for obtaining an arrest warrant and the prosecutor's mistaken statements that only defendant could claim self-defense sufficiently undermined confidence in the reliability of the judgment of conviction. These errors constituted plain error entitling defendant to a new trial. *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004).

To allege insufficiency of evidence as to indispensable element of a crime is to assert plain error. *People v. Harris*, 633 P.2d 1095 (Colo. App. 1981).

But admission of uncounseled statements by defendant may not be plain error. Fact that defendant's attorney was not notified that questioning of his client was going to take place did not make the admission of statements made by defendant during such questioning plain error since the record did not show that the interrogator knew that the defendant had an attorney, and the defendant took the stand and repeated his statements. *People v. Pool*, 185 Colo. 131, 522 P.2d 102 (1974).

Trial court's failure to submit instruction to defense counsel for review prior to reading the instruction to the jury is not plain error. *People v. Martin*, 670 P.2d 22 (Colo. App. 1983).

Prosecutor's argument did not result in plain error. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003); *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

"Plain error" rule must be read in harmony with Crim. P. 30, which provides that no party may assign as error the giving of an instruction to which he has not objected before the instructions are submitted to the jury. *People v. Green*, 178 Colo. 77, 495 P.2d 549 (1972); *People v. Barker*, 180 Colo. 28, 501 P.2d 1041 (1972); *People v. Aragon*, 186 Colo. 91, 525 P.2d 1134 (1974).

Unless manifest prejudice or plain error. Where defendant does not object to the instruction given or tender any alternate instruction which might more adequately set forth the law, an assignment of error is not valid unless there is manifest prejudice amounting to plain error. *People v. Bercillio*, 179 Colo. 383, 500 P.2d 975 (1972).

Because a defendant must make all objections he has to instructions prior to their submission to the jury, where the defendant failed to make any such objection prior to submission of the instructions, absent plain error, the court would not consider the defendant's arguments

on review. *People v. Tilley*, 184 Colo. 424, 520 P.2d 1046 (1974).

Where no specific objection was made prior to submission of instructions to the jury as required by Crim. P. 30, absent plain error, reviewing court will not consider these arguments on appeal. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Where defendant only made a general objection to jury instructions, and failed to make a timely specific objection, supreme court on appeal will not consider argument by defendant that instructions were in error absent plain error. *People v. O'Donnell*, 184 Colo. 104, 518 P.2d 945 (1974).

No prejudicial error if jury is adequately informed. Where the defendant objected to various instructions given to the jury by the trial court, but under the instructions as a whole the jury is adequately informed as to the law, there is no prejudicial error. *People v. Lovato*, 181 Colo. 99, 507 P.2d 860 (1973).

Where instruction on trespass was given to jury in statutory language and instructions were, as a whole, adequate to inform jury of the law on these issues and defendant did not request or tender proposed instruction to define term "unlawfully", failure to instruct on that term did not rise to the level of plain error. *People v. Wortham*, 690 P.2d 876 (Colo. App. 1984).

Prosecutor's comment that evidence of prior similar transactions between the sexual assault victim and the defendant, her father, explained the victim's response to two assaults and her failure to report them earlier is not improper considering the testimony of the victim and the limiting instructions given by the trial court regarding the proper use of the similar transaction evidence. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Doctrine of invited error precludes defendant from challenging jury instruction as prejudicial error since defendant approved and submitted comparable instruction to court. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Although failure to instruct on essential elements constitutes plain error. The trial court has a duty to properly instruct the jury on every issue presented, and the failure to do so with respect to the essential elements of the crime charged constitutes plain error. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Mattas*, 645 P.2d 254 (Colo. 1982); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

As does erroneous instruction. Where a given instruction permits the jury to convict without proof of essential element of the crime, there is plain error, and reversal is required. *People v. Butcher*, 180 Colo. 429, 506 P.2d 362 (1973).

The giving of an instruction which allows the jury to find the defendant guilty upon a lesser degree of culpability than that required by the statute constitutes plain error. *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982).

Or inadequate instruction. Where a general instruction on specific intent does not particularly direct the jury's attention to defendant's theory that he could not have possessed the requisite specific intent, it is the duty of the court either to correct the tendered instruction or to give the substance of it in an instruction drafted by the court, and a court's refusal to give such an adequate instruction is error. *Nora v. People*, 176 Colo. 454, 491 P.2d 62 (1971).

Under some circumstances, a court's failure to instruct *sua sponte* on intoxication may result in reversible error. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

But not failure to instruct on lesser included offense. Failure of the court to instruct on a lesser included offense does not affect the substantial rights of defendant and is therefore not cognizable as plain error. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972); *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973); *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Failure to instruct on element of "knowingly". The trial court's failure to include the element of "knowingly" in a second-degree kidnapping instruction is plain error. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

It was not plain error for trial court to submit to the jury the "result" factor and omit the "conduct-and-circumstance" factor in the definitional instruction of "knowingly" in a first degree criminal trespass case because the instruction could neither mislead nor confuse the jury. *People v. Wortham*, 690 P.2d 876 (Colo. App. 1984).

Failure to give definition of "attempt". The trial court's failure to include the definition of attempt found in the criminal attempt statute in instructions for the pertinent provisions of the second degree assault statute was not plain error. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

Jury instruction on aggravated robbery did not constitute plain error as defendant was given notice by language in the information that he was being charged with both methods of committing crime even though instruction differed from language in the information. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Failure to give definition of "without lawful justification". Where this phrase appeared in second-degree kidnapping statute without further definition, and defendant made no claim of legal authority to transport nonconsenting victim, trial court's instruction to jury to give phrase "the common meaning that the words

imply" was not plain error. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Trial court's failure to ascertain reasons for defendant's waiver of right to testify not plain error where defendant did not raise issue in his motion for a new trial and did not allege or present evidence that the waiver was not knowing, intelligent, or voluntary. *People v. Wortham*, 690 P.2d 876 (Colo. App. 1984).

Failure to issue a contemporaneous limiting instruction. Failure of the court to issue a limiting instruction contemporaneously with the history of arrest testimony, which testimony related to a crime separate and unrelated to the crime for which defendant was being tried, did not constitute plain error. *People v. White*, 680 P.2d 1318 (Colo. App. 1984).

Failure to instruct the jury on gender bias was not a "structural defect" or plain error requiring reversal of third degree sexual assault conviction where gender bias was not raised during the trial and the jury was instructed sympathy or prejudice should not influence its decision. *People v. Johnson*, 870 P.2d 571 (Colo. App. 1993).

Although the general rule is that there may be no appellate review of issues not raised in a new trial motion, there is an exception for claims that the trial court committed plain error. *People v. Ullerich*, 680 P.2d 1306 (Colo. App. 1983).

Where court presented the jury with irreconcilable statements about the requisite culpability for a securities fraud violation, a conviction cannot be permitted to rest on such an equivocal direction to the jury on one of the basic elements of the crime. *People v. Riley*, 708 P.2d 1359 (Colo. 1985).

The cumulative effect of a proper jury instruction with improper jury instructions that contained erroneous statements of law which relegated to the jury the function of determining whether an affirmative defense was available in a case and which had the effect of relieving the prosecution of its burden of proof in regard to the affirmative defense was insufficient to dispel the potential harm created by the erroneous jury instructions and was, therefore, plain error. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Joint operation instruction does not remove case from plain error rule. When the jury was told that specific intent applies to every element of aggravated robbery, that specific intent applies only to the intention to kill, maim, or wound, and that "knowingly" applies if the intent was to put the victim in fear of death or bodily injury, jury could not be expected to know what, if any, culpable mental state applied. *People v. Pickering*, 725 P.2d 5 (Colo. App. 1985).

Error of constitutional dimension. Ordinarily, plain error requires reversal only if there is a

reasonable possibility that it contributed to the defendant's conviction. However, if the asserted error is of constitutional dimension, reversal is required unless the court is convinced that the error was harmless beyond a reasonable doubt. *Graham v. People*, 705 P.2d 505 (Colo. 1985).

An error in the admission of evidence, even if of constitutional dimension, does not require reversal of a criminal conviction if the error was harmless beyond a reasonable doubt. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Trial court's actions cannot be considered as harmless error where the court's removal of the determination of the authority of a defendant charged with theft to borrow the victim's money from the province of the jury violated the defendant's sixth amendment right to a jury trial. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

In determining whether prosecutorial impropriety mandates a new trial, appellate courts are obliged to evaluate the severity and frequency of the misconduct, any curative measures taken to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant's conviction. *People v. Jones*, 832 P.2d 1036 (Colo. App. 1991).

Reversible error exists if there are grounds for believing that the jury was substantially prejudiced by improper conduct. Where the prosecutor's ill-advised and improper comments were so numerous and highly prejudicial, the defendant was deprived of a fair trial requiring that the judgment of conviction be reversed. *People v. Jones*, 832 P.2d 1036 (Colo. App. 1991).

Prosecution's comments during closing argument did not rise to the level of reversible error where comments were small part of lengthy closing; prosecutor fairly summarized the evidence; prosecutor emphasized the jury's prerogative to make an independent determination of the facts; and trial court sustained defense counsel's objections and prosecutor withdrew her comments. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

Prosecutor's use of Burke quotation was an improper attempt to persuade jurors; however, the error was harmless as it was an isolated incident in an otherwise proper closing argument in which the prosecutor repeatedly urged the jury to apply the rules of law to the evidence adduced at trial. *People v. Clemons*, 89 P.3d 479 (Colo. App. 2003).

The determination of whether a prosecutor's statements constitute inappropriate prosecutorial argument is generally a matter for the exercise of trial court discretion; however, if an appellate court concludes that prejudice created by a prosecutor's conduct was so great as to result in a miscarriage of justice, a new trial may be granted notwithstanding the

trial court's failure to impose such sanction. *Harris v. People*, 888 P.2d 259 (Colo. 1995).

A new trial is the appropriate remedy for the deprivation of the defendant's right to a fair trial where, in view of the prosecutor's repeated remarks, the temporal context of the trial, and the critical role of witness credibility in the case, there was substantial likelihood that the prosecutor's improper comments impermissibly prejudiced the defendant's right to have his guilt determined by an impartial jury applying applicable legal standards to facts found on an objective evaluation of the evidence. *Harris v. People*, 888 P.2d 259 (Colo. 1995).

The sufficiency of evidence presented at trial will be considered on appeal when evaluating claims of prosecutorial misconduct. The conclusion that the prosecutor's comments, repeated over the course of the entire closing argument, were substantially prejudicial was compelled when the conflicting and inconclusive nature of the evidence presented at trial was taken into consideration. *Harris v. People*, 888 P.2d 259 (Colo. 1995).

In determining whether prosecutor's improper statements so prejudiced the jury as to affect the fundamental fairness of the trial, the court shall consider the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction. *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005); *Crider v. People*, 186 P.3d 39 (Colo. 2008).

In light of evidence demonstrating defendant's guilt, prosecutor's conduct was not flagrant or tremendously improper. Although prosecutor made improper statements implying that defendant had a bad character, evidence of the defendant's guilt was strong, defense counsel made no contemporaneous objections to the statements, and the statements were infrequent and a small part of prosecutor's argument. Therefore, the statements did not so undermine the trial's fundamental fairness as to cast doubt on the reliability of the judgment of conviction. *People v. Cordova*, __ P.3d __ (Colo. App. 2011).

It is prosecutorial misconduct for an attorney to characterize a witness's testimony or his character for truthfulness with any form of the word "lie". A violation of this prohibition, although sanctionable in other ways, does not warrant reversal if it was harmless. *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005); *Crider v. People*, 186 P.3d 39 (Colo. 2008).

Review of jury instruction for constitutional error where such instruction was submitted by the defendant is barred by application of invited error doctrine. *People v. Zapata*, 779 P.2d 1307 (Colo. 1989).

Failure to instruct jury as to presumption of innocence is plain error. *People v. Aragon*, 665 P.2d 137 (Colo. App. 1982).

Instructions held not to constitute "plain error". *People v. Otwell*, 179 Colo. 119, 498 P.2d 956 (1972); *People v. Majors*, 179 Colo. 204, 499 P.2d 1200 (1972); *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972); *People v. Eades*, 187 Colo. 74, 528 P.2d 382 (1974).

Instruction to the jury on the credibility of the witnesses, where the words "including the defendant" were crossed out but were not totally obliterated and could be deciphered by the jury, did not constitute plain error. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Where the defendant is charged with aggravated robbery and conspiracy to commit aggravated robbery, and is not entitled to an instruction on theft, an error in a theft instruction is harmless. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

Challenges to interpreter must be made. When an interpreter is necessary for the court to translate testimony and the defense makes no challenge to the interpreter's qualifications or competency, the doctrine of plain error may not be applied in motion for new trial. *People v. Bercillo*, 179 Colo. 383, 500 P.2d 975 (1972).

As must challenge of medical expert, unless plain error. Where defendant failed to interpose a timely objection to the trial court's qualification of a prosecution witness as a medical expert, any error in this regard did not rise to the level of plain error and thus was not recognized on appeal. *People v. Litsey*, 192 Colo. 19, 555 P.2d 974 (1976).

As well as objections to admonishment of defense counsel. Where the trial court recesses in the middle of the cross-examination and admonishes defense counsel in the presence of the jury to the effect that counsel should change his attitude, and defendant's counsel does not object to the recess or the admonishment, it is not of a level to be "plain error". *People v. Lovato*, 181 Colo. 99, 507 P.2d 860 (1973).

Determination of whether the misconduct at trial was plain error turns not on the nature of the misconduct but on the impact of the misconduct upon the result. *People v. Constant*, 44 Colo. App. 544, 623 P.2d 63 (1980), *rev'd* on other grounds, 645 P.2d 843 (Colo. 1982).

Prosecutorial misconduct provides a basis for reversal because of plain error only where there is a substantial likelihood that it affected the verdict or deprived a defendant of a fair and impartial trial. *People v. Constant*, 645 P.2d 843 (Colo. 1982).

Prosecutor's statement in closing argument held not to be plain error as comment in

context was not calculated or intended to direct attention to defendant's failure to testify in his own behalf. *People v. Wiegard*, 727 P.2d 383 (Colo. App. 1986).

Prosecutor's remark not plain error where remark may have been invited by defense counsel, remark was tangential and could not have prejudiced defendant, and there was overwhelming evidence of defendant's guilt. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Although prosecutor's remark during summation that the defendant had lied during his testimony and allusions to defendant's friends' cocaine habit was inappropriate, it did not constitute plain error. The improper comments were isolated ones included in a lengthy summation and could not have affected the verdict. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

The scope of final arguments rests in the sound discretion of the trial court and its ruling will not be disturbed on appeal in the absence of gross abuse of discretion resulting in prejudice and a denial of justice. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Prosecutorial misconduct must be flagrantly improper to be classified as plain error. Prosecutor's comment that the evidence of similar transactions between the victim and her father explained the victim's response to the assaults and her failure to report them earlier was not error considering the testimony of the victim and the limiting instructions given by the trial court regarding the proper use of similar transactions evidence. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Prosecutor's characterization of defendant's statement held "plain error". The prosecutor's characterization in his summation of defendant's written pretrial statement as "riddled with lies" constituted plain error affecting defendant's substantial rights. *People v. Trujillo*, 624 P.2d 924 (Colo. App. 1980).

As is exposure of handcuffed defendant. A denial of a fair trial occurs where a defendant appears before a jury in handcuffs when the exposure was unnecessary and prejudicial. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

As is improper admission of evidence of other offenses. Admission into evidence of offenses not alleged as basis of habitual criminality during the second phase of a bifurcated trial constitutes reversible error. *People v. Lucero*, 200 Colo. 335, 615 P.2d 660 (1980).

The giving of a "time-fuse" instruction (which grants the jury a time limit to finish its deliberations, at the end of which the jury will be dismissed) constitutes plain error and requires reversal. *Allen v. People*, 660 P.2d 896 (Colo. 1983).

Failure to provide transcript of prior mistrial is of such magnitude that it requires a new

trial. *People v. St. John*, 668 P.2d 988 (Colo. App. 1983).

Where enhancement of sentence for crime of violence is plain error. Where a defendant is convicted of first-degree murder, and the mittimus reads that he was found to have committed a "crime of violence", but the jury was not instructed on the elements of crime of violence nor given a separate verdict form or interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first-degree murder only, and for imposition of sentence on that crime only. *People v. Thrower*, 670 P.2d 1251 (Colo. App. 1983).

Fact that testimony of hospital employee regarding defendant's statements made while confined for sanity examination used to rebut defendant's self-defense theory was given in prosecution's case-in-chief rather than as rebuttal testimony did not constitute plain error. *People v. Kruse*, 839 P.2d 1 (Colo. 1992).

Because the trial record contained significant evidence of defendant's guilt, any error by the trial court in admitting certain testimony was not plain error. *People v. Mapps*, 231 P.3d 5 (Colo. App. 2009).

Testimony by the victim and police officer describing the robber does not constitute plain

error. The evidence corroborated other properly admitted evidence and although arguably cumulative, did not have a tendency to confuse or inflame the jury's passions or undermine the fairness of the trial. *People v. Boehmer*, 872 P.2d 1320 (Colo. App. 1993).

Allowing a jury unsupervised access to videotape and transcript of a drug transaction between the defendant and a police informant was not plain error. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

Prejudicial error found. *People v. Snook*, 729 P.2d 1026 (Colo. App. 1986), *aff'd*, 745 P.2d 647 (Colo. 1987).

Allowing defendant to stand trial in orange jump suit, which defendant described as prison garb, was not plain error. *People v. Green*, 759 P.2d 814 (Colo. App. 1988).

Declaration of mistrial to correct error at trial. *Zamora v. People*, 175 Colo. 340, 487 P.2d 1116 (1971); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972); *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974); *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974); *People v. Goff*, 187 Colo. 103, 530 P.2d 514 (1974); *People v. Rogers*, 187 Colo. 128, 528 P.2d 1309 (1974); *People v. Becker*, 187 Colo. 344, 531 P.2d 386 (1975).

Rule 53. Regulation of Conduct in the Courtroom

Conduct in the courtroom pertaining to the publication of judicial proceedings shall conform to Canon 3 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Colorado.

Rule 54. Application and Exception

(a) **Courts.** These Rules apply to all criminal proceedings in all courts of record in the state of Colorado. These Rules do not apply to municipal ordinance and charter violations.

(b) **Proceedings.**

(1) **Peace Bonds.** These Rules do not alter the power of judges to hold for security of the peace and for good behavior as provided by law, but in such cases the procedure shall conform to these rules so far as they are applicable.

(2) **Other Proceedings.** These Rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute or the collection of fines and penalties; nor to any other special proceedings where a statutory procedure inconsistent with these Rules is provided.

(c) **Application of Terms.** "Law" includes statutes and judicial decisions. "Civil action" refers to a civil action in a court of record. "Oath" includes affirmations. "Prosecuting attorney" means the attorney general, a district attorney or his assistant or deputy or special prosecutor. The words "demurrer", "motion to quash", "plea in abatement", "plea in bar", and "special plea in bar", or words to the same effect in any statute, shall be construed to mean the motion raising a defense or objection provided in Rule 12.

(d) **Numbering — Meaning of "No Colorado Rule".** Insofar as practicable, the order and numbering of these Rules follows that of the Federal Rules of Criminal Procedure. In some instances, usually because of differences in judicial systems or of jurisdiction, there is no Colorado rule corresponding in number with an existing federal rule. In these instances to maintain the general numbering scheme, the phrase "No

Colorado Rule" appears opposite the number for which there is a federal rule but not a Colorado rule. The phrase "No Colorado Rule" means only that there is no rule included in these Rules covering the subject of the federal rule bearing that number. The phrase does not imply either that there is or that there is not constitutional, statutory or case law in Colorado covering the subject of the corresponding federal rule.

ANNOTATION

Rules of criminal procedure not applicable to extradition proceedings. Allowing full discovery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. *Temen v. Barry*, 695 P.2d 745 (Colo. 1984).

Rules of criminal procedure govern all proceedings in criminal actions in courts of record. *People ex rel Shinn v. District Court*, 172 Colo. 23, 469 P.2d 732 (1970).

But not trial de novo for violation of ordinance. The municipal court rules and not the rules of criminal procedure apply in a trial de

novo in the county court for violation of a municipal ordinance. *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules of criminal procedure not applicable to extradition proceedings. Allowing full discovery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. *Temen v. Barry*, 695 P.2d 745 (Colo. 1984).

Applied in *People v. Brisbin*, 175 Colo. 423, 488 P.2d 63 (1971); *People v. Reliford*, 39 Colo. App. 474, 568 P.2d 496 (1977).

Rule 55. Records

(a) **Register of actions (criminal docket).** The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below. The register of actions may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file, or the cover of the case jacket for county court cases.

(2) A microfilm roll, film jacket, or microfiche card.

(3) Computer magnetic tape or magnetic disc storage, where the register of actions items appear on the terminal screen, or on a paper print-out of the screen display.

(4) Any other form or style prescribed by supreme court directive.

A register of actions shall be prepared for each case or matter filed. The file number of each case or matter shall be noted on every page, jacket cover, film, or computer record whereon the first and all subsequent entries of actions are made. All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. The notation of the judgment in the register of actions shall constitute the entry of judgment. When trial by jury has been demanded or ordered, the clerk shall enter the word jury on the page, jacket cover, film, or computer record assigned to that action.

(b) **Criminal Record.** Repealed effective September 4, 1974.

(c) **Indices; Calendars.** The clerk shall keep suitable indices of all records as directed by the court. The clerk shall also keep as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any of the following forms or styles:

(1) A page or sheet in a book or separate file.

(2) A mechanical or hand operated index machine or card file.

(3) Computer magnetic tape or magnetic storage, where the information appears on the terminal screen, or on a print-out of the screen display.

(4) Microfilm copies of (1), (2), and (3) above.

(5) Any other form or style prescribed by supreme court directive.

(d) **Files.** All papers filed in a case shall be filed in a separate file folder except that "Summons and Complaint" documents may be filed otherwise but only as may be authorized by the Supreme Court.

(e) **Reporter's Notes; Custody, Use, Ownership, Retention.** The practice and procedure concerning reporter's notes and electronic or mechanical recordings shall be as prescribed in Rule 80, C.R.C.P., for district courts and Rule 380, C.R.C.P., for county courts.

(f) **Retention and Disposition of Records.** The clerk shall retain and dispose of all court records, including those created under Rule 55(b) prior to its repeal, in accordance with instructions provided in the manual entitled, Colorado judicial department, records management.

ANNOTATION

Court of record has an affirmative duty to contemporaneously record all proceedings. Reconstruction of the record at a later time is not an adequate substitute for a contemporaneous record. *Jones v. District Court*, 780 P.2d 526 (Colo. 1989).

Bench or side-bar conferences are not to be conducted off the record unless the parties so request or so consent. *Jones v. District Court*, 780 P.2d 526 (Colo. 1989).

But a failure to record all trial proceedings will not always result in reversible error. Trial court's failure to record certain bench conferences and pretrial conference was harmless

where defense counsel never objected to unrecorded proceedings, defendant cannot show how error prejudiced her, and there is sufficient information on the record to rule on appeal. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

The court did not err by taking judicial notice of defendant's probation status after determining the status from the state computer system. Since § 13-1-119 and this rule expressly approve of records kept and maintained in a state computer system, the court may take judicial notice of the court records contained in the system. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Rule 56. Courts and Clerks

(a) **All Courts Deemed Open.** All courts of record shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays, legal holidays and such other days as the courthouse of the particular court shall be closed as provided by federal or state statute.

(b) **County Courts Away from County Seat.** When a county court is held regularly at a location other than the county seat, the county judge shall designate by rule when such place shall be open for the transaction of court matters. The clerk's office, with the clerk or ex officio clerk or a deputy in attendance, shall be open during business hours on all days except Sundays, legal holidays, and such other days as the courthouse of the particular court shall be closed as provided by federal or state statute.

Rule 57. Rules of Court

(a) **Rules of Courts of Record.** All local court rules, including local county court procedures and standing orders having the effect of local court rules regarding the criminal courts, enacted before February 1, 1992, are hereby repealed. Each court, by a majority of its judges, may from time to time propose local court rules and amendments of the local court rules. A proposed local rule or amendment shall not be inconsistent with the Colorado Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in criminal courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local court rules is required. Numbering and format of any local court rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. Upon approval by the Supreme Court of the local rule or amendment, a copy shall be furnished to the office of the Judicial Administrator to the end that all rules as provided herein may be published promptly and

that copies may be available to the public. The Supreme Court's approval of a local court rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of a court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of Criminal Procedure.

(b) **Procedure Not Otherwise Specified.** If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists.

Source: Entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Applied in *Sollitt v. District Court*, 180 Colo. 114, 502 P.2d 1108 (1972).

Rule 58. Forms

See the Appendix to Chapter 29 for illustrative forms.

Rule 59. Effective Date

These Rules, except as noted on specific rules, take effect on April 1, 1974. Amendments take effect on the date indicated. They govern all proceedings in criminal actions brought after they take effect and also all further proceedings in actions then pending.

ANNOTATION

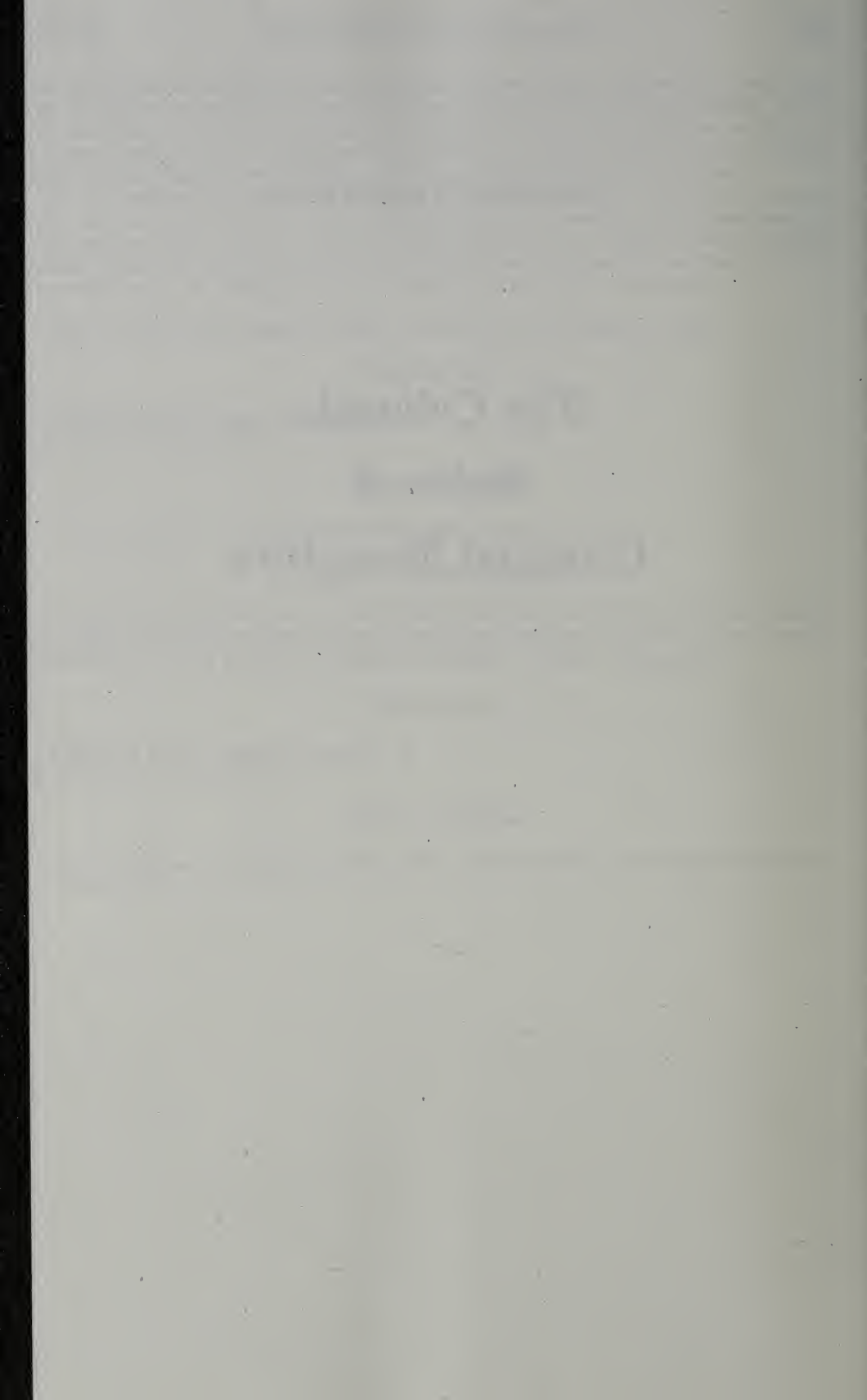
Applied in *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975).

Rule 60. Citation

These Rules may be known and cited as the "Colorado Rules of Criminal Procedure", or "Crim. P."

APPENDIX TO CHAPTER 29

**The Colorado
Rules of
Criminal Procedure**



APPENDIX TO CHAPTER 29

FORMS

(See Rules 16, 35, and 37)

Forms of captions are to be consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

SPECIAL FORM INDEX

- Form 1. Notice of Appeal.
- Form 2. Designation of Record on Appeal.
- Form 3. Checklist for Action Taken at Omnibus Hearing.
- Form 4. Petition for Postconviction Relief Pursuant to Crim. P. 35(c).

Form 1.

<input type="checkbox"/> County Court _____ County, Colorado Court Address: _____	▲ COURT USE ONLY ▲ Case Number: _____ Division: Courtroom: _____
THE PEOPLE OF THE STATE OF COLORADO: v. Defendant: _____	
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. # _____	
NOTICE OF APPEAL	

To: The County Court in and for the County of _____, State of Colorado and the above named _____.

Please take notice that the undersigned counsel for the _____ will file an appeal on behalf of the _____ herein, _____

Said appeal will be docketed in the District Court pursuant to Rule _____, Rules of _____ Procedure in the County Courts.

Done this _____ day of _____, 20____.

By _____
Attorney

I, _____, hereby certify that I have served a copy of the above Notice of Appeal and a copy of the Designation of Record on Error by depositing a true copy of each in the United States mail, with sufficient postage prepaid and addressed to _____, whose address is _____ on this _____ day of _____, 20____.

Form 2.

<input type="checkbox"/> County Court _____ County, Colorado Court Address:		
THE PEOPLE OF THE STATE OF COLORADO: v. Defendant:		
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #		
		▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
DESIGNATION OF RECORD ON APPEAL		

The Clerk will prepare for the District Court a record of error which shall include the following:

1. All original Process and Pleadings on file in the trial court.
2. All Exhibits.
3. Jury Instructions.
4. Judgments and Orders of the Court.
5. Reporter's Original Transcript—excluding transcript of Jury Voir Dire, Opening Statements and Closing Summation, but including all evidence.

Please prepare and certify with all convenient speed.
Requested this _____ day of _____, 20____.

(Signed) _____
Appellant or Attorney for Appellant

Amount deposited \$_____ for Record.
Appeal Bond in the amount of \$_____ filed.

Form 3.

<input type="checkbox"/> County Court _____ County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO: v. Defendant:	
<div style="text-align: right;">▲ COURT USE ONLY ▲</div> <div>Case Number: Division: Courtroom:</div>	
CHECKLIST FOR ACTION TAKEN AT OMNIBUS HEARING	

A. DISCOVERY BY DEFENDANT

(Number circled shows action taken)

1. The defense states it has obtained full discovery and (or) has inspected the prosecution file, (except)
(If prosecution has refused discovery of certain materials, defense counsel shall state nature of material.

2. The prosecution states it has disclosed all evidence in its possession, favorable to defendant on the issue of guilt.
3. The defendant requests and moves for—
 - 3(a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the prosecution. (Granted) (Denied)
 - 3(b) Discovery of the names of prosecution witnesses and their statements. (Granted) (Denied)
 - 3(c) Inspection of all physical or documentary evidence in plaintiff's possession. (Granted) (Denied)
4. Defendant, having had discovery of Items #2 and #3, requests and moves for discovery and inspection of all further or additional information coming into the plaintiff's possession as to Items #2 and #3. (Granted) (Denied)
5. The defense requests the following information and the plaintiff states—
 - 5(a) The prosecution (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
 - 5(b) Expert witness (will) (will not) be called:
 - (1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.
 - 5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.
 - 5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.
 - 5(e) Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution—
 - (1) obtained from or belonging to the defendant, or
 - (2) which will be used at the hearing or trial, (have been) (will be) supplied to defendant.
 - 5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

- 5(g) Prosecution to use prior felony conviction for impeachment of defendant if he testifies,
Date of conviction _____ Offense _____
- (1) Court rules it (may) (may not) be used.
 - (2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)
- 5(h) Any information government has, indicating entrapment of the defendant (has been) (will be) supplied.

B. MOTIONS REQUIRING SEPARATE HEARING

The defense moves—

- 6(a) To suppress physical evidence in plaintiff's possession on the grounds of:
- (1) Illegal search
 - (2) Illegal arrest
- 6(b) Hearing of motions to suppress physical evidence set for _____
- 6(c) To suppress admissions or confessions made by defendant on the grounds of
- (1) Delay in arraignment
 - (2) Coercion or unlawful inducement
 - (3) Violation of the Miranda Rule
 - (4) Unlawful arrest
 - (5) Improper use of Line-up (Wade & Gilbert)
- 6(d) Hearing to suppress admissions or confessions set for
- (1) Date of trial. (or) (2) _____

Prosecution to state:—

- 6(e) Proceedings before the grand jury (were) (were not) recorded;
- 6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied;
- 6(g) Hearing re supplying transcripts set for _____
- 6(h) The prosecution to state:
- (1) There (was) (was not) an informer (or lookout) involved;
 - (2) The informer (will) (will not) be called as a witness at the trial;
 - (3) It has supplied the identity of the informer; (or)
 - (4) It will claim privilege of non-disclosure.
- 6(i) Hearing on privilege set for _____
- 6(j) The prosecution to state:—
- There (has) (has not) been any—
- (1) Electronic surveillance of the defendant or his premises;
 - (2) Leads obtained by electronic surveillance of defendant's person or premises;
 - (3) All material will be supplied, or
- 6(k) Hearing on disclosure set for _____

C. MISCELLANEOUS MOTIONS

The defense moves—

- 7(a) To dismiss for failure of the indictment (or information) to state an offense. (Granted) (Denied)
- 7(b) To dismiss the indictment or information (or count _____ thereof) on the ground of duplicity. (Granted) (Denied)
- 7(c) To sever case of defendant _____ and for a separate trial. (Granted) (Denied)
- 7(d) To sever count _____ of the indictment or information and for a separate trial thereon. (Granted) (Denied)

- 7(e) For a Bill of Particulars. (Granted) (Denied)
- 7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)
- 7(g) To require the prosecution to secure the appearance of witness _____ who is subject to state direction at the trial or hearing. (Granted) (Denied)
- 7(h) To inquire into the reasonableness of bail. Amount fixed _____ (Affirmed) (Modified to _____).

D. DISCOVERY BY THE PROSECUTION

D.1. STATEMENTS BY THE DEFENSE IN RESPONSE TO PROSECUTION REQUESTS

- 8. Competency, Insanity and Diminished Mental Responsibility
 - 8(a) There (is) (is not) any claim of incompetency of defendant to stand trial;
 - 8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense;
 - 8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;
 - 8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;
 - 8(e) Defendant (will) (will not) submit to a psychiatric examination by a court-appointed doctor on the issue of his sanity at the time of the alleged offense;
- 9. Alibi
 - 9(a) Defendant (will) (will not) rely on an alibi;
 - 9(b) Defendant (will) (will not) furnish a list of his alibi witnesses;
- 10. Scientific Testing

Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests;

 - 11(a) Nature of the Defense

Defense counsel states the general nature of the defense is—

 - (1) lack of knowledge of contraband
 - (2) lack of special intent
 - (3) diminished mental responsibility
 - (4) entrapment
 - (5) general denial. Put prosecution to proof.
 - 11(b) Defense counsel state there (is) (is not) (may be) a probability of a disposition without trial;
 - 11(c) Defendant (will) (will not) waive a jury and ask for a court trial;
 - 11(d) Defendant (may) (will) (will not) testify;
 - 11(e) Defendant (may) (will) (will not) call additional witnesses.
 - 11(f) Character witnesses (may) (will) (will not) be called.
 - 11(g) Defense counsel will supply the prosecution names of additional witnesses for defendant _____ days before trial.

D.2. RULINGS ON PROSECUTION REQUEST AND MOTIONS

The defendant is directed by the court, upon timely notice to defense counsel,

- 12(a) to appear in a lineup
- 12(b) to speak for voice identification by witnesses
- 12(c) to be fingerprinted
- 12(d) to pose for photographs (not involving a reenactment of the crime)
- 12(e) to try on articles of clothing

- 12(f) to permit taking of specimens of material under fingernails;
- 12(g) to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion;
- 12(h) to provide samples of his handwriting
- 12(i) to submit to a physical external inspection of his body.

E. STIPULATIONS

It is stipulated between the parties:

- 13(a) That if _____ was called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen; that he never gave the defendant or any other person permission to take the motor vehicle.
- 13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).
- 13(c) That if _____ the official state chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or the information) has been chemically tested and is _____, contains _____, and the weight is _____
- 13(d) That there has been a continuous chain of custody in state agents from the time of the seizure of the contraband to the time of the trial.
- 13(e) Miscellaneous stipulations:

F. CONCLUSION—DEFENSE COUNSEL STATES

- 14(a) That defense counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal search or arrest, or any other constitutional problem, except as set forth above.
- 14(b) That defense counsel has inspected the check list on this Action Taken form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.

Approved:

Dated: _____
SO ORDERED

Attorney for the State of _____

JUDGE

Attorney for Defendant

=====

Form 4.

District Court _____ County, Colorado Court Address: _____		▲ COURT USE ONLY ▲
People of the State of Colorado v. Defendant		
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____		
		Case Number: _____ Division _____ Courtroom _____
PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(c)		

CONVICTION UNDER ATTACK

1. What was the date of your conviction? _____ (day/month/year).
2. Which of the following resulted in your conviction? ☐ PLEA, ☐ JURY TRIAL, OR ☐ COURT TRIAL
3. Were you represented by an attorney? ☐ YES ☐ NO

If yes, list the names and addresses of any attorney who has ever represented you in this case. Attach additional sheets if necessary.

Name: _____	Name: _____
Address: _____	Address: _____
_____	_____
_____	_____

Nature of Representation (for example: preliminary hearing, plea, trial)

_____	_____
_____	_____

DIRECT APPEAL

4. Was this case appealed? ☐ YES ☐ NO If yes, please provide the following:
- Appeal Case Number: _____
- Appellate Court: _____
- Result: _____ Date: _____

POSTCONVICTION PROCEEDINGS

5. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal, such as Rule 35(a), Rule 35(c), or a Writ of Habeas Corpus? ☐ YES ☐ NO

6. If your answer to 5 was "YES" give the following information for each petition filed:

a. FIRST petition, application or motion.

(1) Name of court _____

(2) Nature of proceeding (for example, Rule 35(a), Rule 35(c), § 2254 Writ of Habeas Corpus)

(3) Claims raised

(4) Name of attorney if any _____

(5) Did you receive an evidentiary hearing on your petition, application, or motion? ☐ YES ☐ NO

(6) Result _____

(7) Date of Result _____

(8) Did you appeal the result? ☐ YES ☐ NO

i) If you did appeal, what was the result and date of the court's decision (or attach a copy of the court's opinion or order)?

ii) If you did not appeal, briefly explain why you did not.

b. For a second or subsequent petition, please answer the questions listed in (6)(a)(1) through (7) above. Attach a separate sheet of paper and state at the top that you are listing other motions or petitions filed in this case.

REQUEST FOR COUNSEL

7. Are you requesting that counsel be appointed to represent you on this petition?

☐ YES ☐ NO If yes, please attached an indigency application (JDF 208).

CLAIMS

Briefly specify every ground on which you claim that you are being held unlawfully.

- STATE THE FACTS RELATED TO YOUR CLAIM ON ONE PAGE AND PUT ANY LEGAL AUTHORITY ON A SEPARATE PAGE.
- YOU SHOULD RAISE IN THIS PETITION ALL THE CLAIMS FOR RELIEF THAT RELATE TO THE CONVICTION OR SENTENCE UNDER ATTACK. IF YOU DO NOT RAISE ALL CLAIMS HERE, THE COURT MAY NOT HAVE TO ENTERTAIN LATER MOTIONS FOR SIMILAR RELIEF.

GROUND OF PETITION

Specify every ground on which you claim that you are being held unlawfully, by placing a check mark in the appropriate box below and providing the required information. Include all facts. Attach pages stating the grounds and the facts referenced to each claim.

8. The grounds for this Petition are as follows: (check all that apply)

- a. ☐ The Defendant has sought appeal of a conviction within the time prescribed, and judgment on that conviction has not then been affirmed upon appeal, and there has been a significant change in the law which if applied to this conviction or sentence, the interests of justice allow the retroactive application of the changed legal standard. (In other words, there was a change in the law and the Defendant is allowed the positive retroactive effect of the change.)
- b. No review of a conviction of crime was sought by appeal within the time prescribed therefore, or a judgment of conviction was affirmed upon appeal. However, in good faith the Defendant alleges one or more of the following:
- (1) ☐ That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state.
 - (2) ☐ That the Defendant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected.
 - (3) ☐ That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter.
 - (4) ☐ That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the Defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.
 - (5) ☐ Any other ground otherwise properly the basis for collateral attack upon a criminal judgment.
 - (6) ☐ That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

For any box checked, YOU MUST attach a separate sheet of paper with the ground listed at the top of the page and number it accordingly, 8(a), 8(b)(1), 8(b)(2), 8(b)(3), 8(b)(4), 8(b)(5), 8(b)(6), and/or 8(b)(7). On each separate sheet of paper list each and every fact you feel supports that claim. Be specific and give details.

9. Colorado Revised Statutes §16-5-402(1) provides that a person who has been convicted under a criminal statute in Colorado or another state may collaterally attack the validity of that conviction only if such attack is brought within a specified time period or completion of the direct appeal process for that conviction, unless one of the exceptions listed in §16-5-402(2), C.R.S. are applicable. The specified time periods are as follows:

All class 1 felonies:	No limit
All other felonies:	Three years
Misdemeanors:	Eighteen months
Petty offenses:	Six months

- a. Was this petition filed within the time limits set forth in §16-5-402(1), 6 C.R.S. (above)?

☐ YES ☐ NO

b. If not, check any applicable exceptions listed in §16-5-402(2), 6 C.R.S., and state the FACTS that relate to the exception. DO NOT MAKE LEGAL ARGUMENTS.

- (1) ☐ The court entering judgment of conviction did not have jurisdiction over the subject matter of the alleged offense;
- (2) ☐ The court entering judgment of conviction did not have jurisdiction over the person of the Defendant;
- (3) ☐ The failure to seek relief within the applicable time period was caused by an adjudication of incompetence or by commitment of the Defendant to an institution for treatment as a mentally ill person; or
- (4) ☐ The failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect.

For every ground you checked as grounds for this petition not being filed within the statutory time limits, YOU MUST attach a separate sheet of paper with that ground listed at the top of the page and numbered accordingly 9(b)(1), 9(b)(2), 9(b)(3), and/or 9(b)(4). On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

SUCCESSIVE PETITIONS

Important Notice Regarding Additional Petitions:

With specific exceptions provided for in Criminal Procedure Rule 35(c)(3)(VII), the court shall deny any claim that could have been presented in an appeal or postconviction proceeding previously brought.

Therefore, all claims related to the conviction under attack in this petition must be listed in this petition, or future motions may be denied.

Wherefore, petitioner prays that the Court grant relief to which petitioner may be entitled in this proceeding.

PETITIONER'S ORIGINAL SIGNATURE

(date)

PETITIONER'S PRINTED NAME

ADDRESS

CITY, STATE, ZIP CODE

PHONE NUMBER

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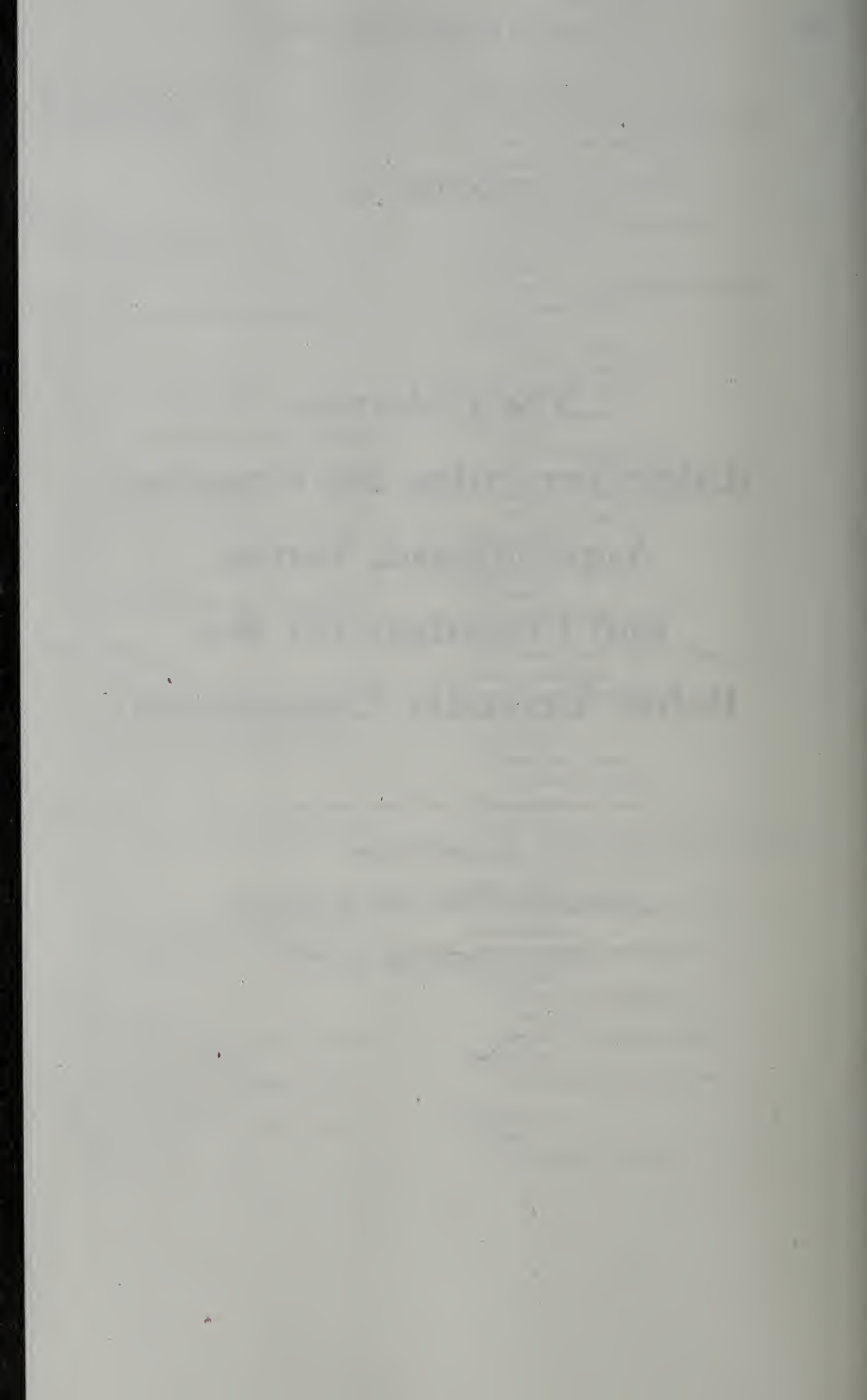
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CHAPTER 29.3

**The Colorado
Rules Governing the Creation,
Appointment, Terms,
and Procedure for the
Public Defender Commission**

Adopted by the
SUPREME COURT OF COLORADO
Effective September 13, 1979



CHAPTER 29.3

COLORADO RULES GOVERNING THE CREATION, APPOINTMENT, TERMS, AND PROCEDURE FOR THE PUBLIC DEFENDER COMMISSION

(1) Pursuant to Section 21-1-101, Colorado Revised Statutes, as amended, the Colorado Supreme Court hereby creates and establishes the Colorado Public Defender Commission. The commission shall have the following duties:

- a. To appoint the Colorado State Public Defender;
- b. To receive and act upon complaints made against the Public Defender; and
- c. To remove the Public Defender upon a showing of adequate cause as set forth in these rules.

(2) The commission shall consist of five members appointed by the Chief Justice for staggered five-year terms beginning July 1, 1979. The Chief Justice shall determine the length of the initial term of each member, if such term is less than five years, to create the staggered full terms. In making appointments to the commission, the Chief Justice shall adhere to the qualifications and disqualifications set forth in Section 21-1-101(2), Colorado Revised Statutes, as amended, and shall take into consideration those matters set forth in the statute regarding place of residence, sex, race, and ethnic background.

(3) Any vacancy in the membership of the commission shall be filled by appointment by the Chief Justice in accordance with the membership qualifications stated above, and for the balance of the term remaining for the vacant position. A member of the commission shall be deemed to have resigned if that member is absent from three consecutive commission meetings.

(4) Any member of the commission may be reappointed for one full term following that member's initial term.

(5) The commission shall select a chairman from among its members. The chairman shall serve at the pleasure of the commission, and the chairman shall suffer no disqualification or impediment to his vote as a consequence of his occupying the position of chairman of the commission. The commission shall keep minutes of its meeting.

(6) The commission shall meet at least annually, and also upon the call of the chairman when necessary to consider appointment, tenure, or removal of the Public Defender.

(7) Three members shall constitute a quorum of the commission. The affirmative vote of four members of the commission is required for a decision to appoint or remove the Public Defender. Any other act of the commission requires the affirmative vote of a majority of the quorum, or, if more than a quorum is present, of the members present.

(8) In accordance with the procedure set forth below, the person serving as the Public Defender may be removed for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful or persistent failure to perform his duties, conduct prejudicial to the administration of justice, documented incompetence, or violation of any applicable canon or disciplinary rule contained in the Code of Professional Responsibility.

(9) Members of the Public Defender Commission shall serve without compensation but shall be reimbursed for actual and reasonable expenses incurred in the performance of their duties.

(10) **Procedure for Appointment of the Public Defender.** Any time a vacancy exists in the position of Public Defender, either by removal or resignation of the person serving as Public Defender or at the expiration of the term of any incumbent Public Defender, the commission shall select and appoint a person to serve as Colorado State Public Defender. The commission may reappoint an incumbent Public Defender. The selection and appoint-

ment of the Public Defender shall be based solely upon the merit of the appointee, pursuant to such procedures as the commission may adopt and in conformity with the qualifications set forth in section 21-1-102, C.R.S., as amended.

(11) **Hearing Examiner.** The commission may appoint one or more hearing examiners to conduct hearings in removal cases. Each hearing examiner shall be an attorney who has practiced law in Colorado for at least five years. A hearing examiner may be appointed for a two-year term to handle cases referred to him during his term by the commission. He shall be compensated on the basis of the actual time spent on commission matters at a rate to be established by the commission, in addition to reimbursement for actual expenses incurred. A hearing examiner and any commission member shall have the power to administer oaths and to issue subpoenas and subpoenas duces tecum for hearings conducted under these rules.

(12) **Procedure for Removal of the Public Defender.**

a. Any person seeking discharge of the Public Defender shall file a written complaint with the commission chairman requesting the Public Defender's discharge and stating all facts the complainant deems necessary to justify the discharge of the Public Defender. The complainant shall transmit copies of his complaint to the Public Defender.

b. The Public Defender shall file a response to the complaint with the commission chairman within ten days following receipt of the complaint, responding to the allegations of the complaint, and justifying whatever action is the subject of the complaint.

c. One member of the commission, selected by rotation of the commission members, shall consider the complaint and response and shall recommend to the commission either that the allegations and response justify a hearing or that the matter should be ruled upon by the commission without a hearing. The commission shall thereupon decide whether or not to hold a hearing. The Public Defender shall not be discharged unless a hearing is held.

d. If the commission determines not to hold a hearing, it shall so notify the parties, stating the matters considered and reasons for denying the hearing. The commission shall then decide the matter of the complaint upon the documents submitted by the parties without a hearing and shall dismiss the complaint or order such remedial action as the commission deems appropriate under the circumstances. The commission shall notify the complainant and the Public Defender of the commission's decision.

e. If the commission determines to hold a hearing, it shall so notify the parties, the hearing examiner, and all the interested and concerned parties. The hearing examiner shall set a convenient date and place for the hearing, to be held within thirty days after notification by the commission. Hearings shall be open to the public, unless a closed hearing is requested by the complainant or the Public Defender and ordered by the hearing examiner, and shall be recorded verbatim either stenographically or electronically.

f. Hearings shall be conducted in accordance with the provisions and procedures prescribed by Section 24-4-105, C.R.S., as amended, and the hearing examiner shall have the power therein granted, except that where such provisions are in conflict with the provisions of these rules, these rules shall control.

g. The hearing examiner shall conduct the hearing and shall afford the parties opportunity to introduce evidence, including testimony and statements of the complainant, his representative, if any, the Public Defender, his representative, if any, and other witnesses, and to cross-examine witnesses. The testimony received shall be under oath or affirmation.

h. Rules of evidence shall not be applied strictly, but the hearing examiner shall exclude irrelevant or unduly repetitious evidence.

i. The burden of initially going forward to show jurisdiction of the commission and the factual basis for the requested discharge of the Public Defender shall be upon the complainant. If the hearing examiner is satisfied that the complainant has met this burden after hearing the complainant's evidence, the hearing examiner shall so rule, and the burden of going forward shall then shift to the Public Defender to show that the action complained of did not occur, or if it did occur, that it was based upon good or justifiable cause.

j. Upon hearing the evidence and statements of the parties, and after such deliberation as necessary, the hearing officer shall make findings and a recommended decision on the issue of whether the Public Defender should be discharged, or whether the complaint

should be dismissed. Any recommended decision of the hearing examiner to discharge the Public Defender shall be based upon clear and convincing evidence.

k. The hearing examiner shall issue a written decision and shall send copies thereof to the commission and to the parties and their representatives, if any. The decision shall contain findings, recommendations for any action, and notification of the right of either party to appeal directly to the commission. The decision shall include an analysis of the findings and a statement of the reasons for the conclusions reached. The commission, on its own motion or upon petition to review by an interested party, may affirm, modify, reverse, or set aside any decision of a hearing examiner on the basis of the evidence previously submitted in the case. The commission may also take additional evidence, or it may remand to the hearing examiner for the taking of additional evidence and a new decision. Unless the commission acts to the contrary, the decision of the hearing examiner shall become the decision of the commission and shall be carried into effect within twenty calendar days after issuance by the hearing examiner.

l. Either party may appeal the decision of the hearing examiner to the full commission. Such appeal shall be filed with the chairman of the commission. An appeal to the commission shall be in writing, setting forth the reasons for the appeal, and shall be filed with the commission within fifteen calendar days after the receipt of the decision of the hearing examiner. The commission may extend this time limit when a party shows that circumstances beyond his control prevent the filing of the appeal within the time limit. If an appeal is filed, the decision shall not be given effect until the commission has decided the appeal.

m. The commission shall review the record of the proceedings, all relevant written representations, and the decision of the hearing examiner. The record of proceedings may include such portions of the transcript of the hearing as may be necessary to consider the exceptions. Transcripts shall be furnished by the party appealing. The commission, may, in its discretion, afford the parties opportunity to appear and present oral arguments and representations.

n. The commission shall issue a written decision, which may consist of an affirmation without comment of the decision of the hearing examiner, and shall send copies thereof to the parties and their representatives, if any. Such decision of the commission shall be subject to court review, as provided below.

(13) Court Review.

a. No action, proceeding, or suit to set aside a commission decision or to enjoin the enforcement thereof shall be brought unless the petitioning party has first petitioned the commission for review of its decision, and no matter not brought to the commission's attention in the petition for review shall be considered on judicial review.

b. Actions, proceedings, or suits to set aside, vacate, or amend any final decision of the commission or to enjoin the enforcement of any final decision of the commission shall be on the record only and commenced in the Supreme Court within twenty days after notification of the final decision.

c. The commission may certify to the Supreme Court questions of law involved in any of its decisions.

d. In judicial proceedings under this article, the findings of the commission as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive.

e. Actions, proceedings, and suits to review any final decision of the commission or questions certified to the Supreme Court by the commission shall be heard in an expedited manner and shall be given precedence over all other civil cases.

f. A commission decision may be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers;
2. That the decision was procured by fraud;
3. That the findings of fact do not support the decision;
4. That the decision is erroneous as a matter of law.

g. In any action in which the plaintiff seeks judicial review of a commission final decision made after a hearing, the parties shall file briefs within the time periods specified in the Colorado appellate rules, and the matter shall be set promptly for oral argument.

h. Pending judicial review of a final decision of the commission discharging the Public Defender, the commission shall appoint an acting Public Defender, and the discharged Public Defender shall be in the status of suspension without pay. If the reviewing court reverses the commission and reinstates the Public Defender, the Public Defender shall be entitled to full compensation from the time of his being placed in status of suspension.

CHAPTER 29.5

**The Colorado
Rules for County Court
Traffic Violations Bureaus**

Adopted by the
SUPREME COURT OF COLORADO

December 15, 1977,
Effective January 10, 1978

THE
HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1880

BY
JOHN H. COOPER
OF THE
BOSTON PUBLIC LIBRARY
AND
OF THE
BOSTON SOCIETY OF THE HISTORY OF THE CITY

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CHAPTER 29.5

COLORADO RULES FOR COUNTY COURT TRAFFIC VIOLATIONS BUREAUS

Rule 1. Establishment of Traffic Violations Bureaus

There is hereby established in every county court in this state a traffic violations bureau for the processing of cases as hereinafter provided.

Rule 2. Purpose and Construction

These rules are intended to provide for the just and speedy disposition of minor traffic cases without appearance before a judge. They shall be construed to secure simplicity and uniformity in procedure and to minimize expense and delay while preserving the rights of defendants.

Rule 3. Definitions

Unless otherwise provided, the following definitions shall apply throughout these rules:

- (a) "Process" means to dispose of cases in a traffic violations bureau without appearance before a judge or referee.
- (b) "Clerk" means the clerk or deputy clerk of a county court.

Rule 4. Cases Processed by Traffic Violations Bureaus

(a) A county court traffic violations bureau may process any case involving violations contained in articles 2, 3, and 4 of title 42, C.R.S., as amended, except the following:

- (1) Cases commenced by the issuance of a penalty assessment notice under section 42-4-1701 (5) (a), C.R.S., as amended;
- (2) Cases involving any violation designated as a class 1 or class 2 traffic offense under article 4 of title 42, C.R.S., as amended;
- (3) Cases involving charges of driving without a valid driver's license or while the driver's license is suspended, denied, or revoked, or while the driver's license has been expired for more than one year;
- (4) Cases involving false, altered, or fraudulent drivers' licenses or false, altered, or fraudulent safety inspection stickers;
- (5) Cases in which the summons indicates that a traffic accident or collision was involved;
- (6) Cases in which the offense charged is a felony;
- (7) Cases involving violations contained in sections 42-2-101 (3), 42-2-106, 42-2-132, 42-2-136, 42-2-139, 42-3-133 (1) (b) to (1) (h), 42-3-142, 42-4-222, 42-4-233, 42-4-606, 42-4-1904, 42-4-712, and 42-4-1208, C.R.S., as amended; and
- (8) Cases involving multiple charges, one or more of which is not eligible for processing in a traffic violations bureau, or to one or more of which a defendant desires to enter a plea of not guilty.

(b) In traffic cases not eligible for processing in the traffic violations bureau, and except for penalty assessment notices paid properly and timely to the motor vehicle division of the department of revenue, an appearance before a judge or referee shall be required.

Source: (a)(1) and (a)(7) corrected and effective November 12, 1999.

Rule 5. Venue

A traffic violations bureau may process only those summonses issued for return in the county court in which the traffic violations bureau is situated.

Rule 6. Plea Agreements Prohibited

No charge shall be reduced, dismissed, or amended, and no new charge shall be added to any summons or complaint processed by any traffic violations bureau. A traffic violations bureau shall accept only a plea of guilty to each offense stated or charged in the notice or summons and complaint.

Rule 7. Acknowledgment and Waiver of Rights

(a) Before processing any case in a traffic violations bureau, the clerk shall ascertain that the defendant has been advised in writing of each of the following:

- (1) The right to appear before a judge or a referee;
- (2) The right to plead not guilty, and to have a trial by a judge, a referee, or a jury;
- (3) The right to be represented by an attorney, and, if the defendant is indigent, to request the appointment of an attorney;
- (4) The right to remain silent, and that any statement made by the defendant can and may be used against him;
- (5) That any plea entered must be voluntary and not the result of undue influence or coercion on the part of anyone;

(6) The amount of fines and costs to be imposed, and that penalty points may be assessed against the driving privilege; and

(7) That if a plea of guilty is entered, the defendant waives the foregoing rights as well as any right of appeal.

(b) A document shall be delivered to the defendant providing a place for the defendant to execute a written acknowledgment and waiver of the rights set forth above, and to enter a plea of guilty to the offense or offenses charged.

(c) Such advisement, waiver, and plea may be incorporated in either of the following documents:

- (1) The summons or notice served upon the defendant; or
- (2) A separate document delivered to the defendant by the peace officer serving the summons or notice, or by the clerk at the traffic violations bureau when the defendant appears in person.

Rule 8. Procedure in Traffic Violations Bureaus

(a) Every traffic case shall be filed and indexed in the county court in the same manner, whether eligible or ineligible for processing in the traffic violations bureau.

(b) A traffic violations bureau shall accept guilty pleas and no others.

(c) A traffic violations bureau shall accept pleas of guilty only to the offense or offenses charged in the notice or summons and complaint and to no other offense. Such pleas may be entered in person, by counsel, or by mail.

(d) Every plea entered at a traffic violations bureau shall be in writing. The clerk shall not accept such plea or payment of fines and costs unless and until the defendant, or defendant's counsel, has executed an acknowledgment and waiver of rights as provided in Rule 7.

(e) Every county court shall post in a conspicuous place in the clerk's office a schedule of the fines and costs and the penalty points as provided by law for the offenses eligible for processing in the traffic violations bureau.

(f) After accepting a plea of guilty, the clerk shall assess and collect the appropriate fines as provided in Rule 9, together with costs as provided in Rule 10, and shall enter the plea and the amount of the fines and costs on the register of actions. After completing the foregoing, the clerk shall sign the register of actions. The completed entries and collections as set forth above shall constitute a judgment of conviction.

(g) The clerk shall provide a written receipt to each defendant, or defendant's attorney, who pays any fine or costs in person, or who provides a stamped, self-addressed envelope for such purpose when making payment by mail.

(h) The clerk shall account for moneys received in the traffic violations bureau in the same manner as in other traffic cases.

(i) The clerk shall report each conviction in the traffic violations bureau to the motor vehicle division of the department of revenue pursuant to section 42-2-124, C.R.S., as amended.

Source: (i) corrected and effective November 12, 1999.

Rule 9. Amounts of Fines

The amounts of fines which shall be assessed in a traffic violations bureau for those violations set forth in the schedule contained in section 42-4-1701 (4) (a), C.R.S., as amended, shall be the amounts specified in that schedule.

Source: Entire rule corrected and effective November 12, 1999.

Rule 10. Costs

Each defendant entering a plea of guilty and paying a fine shall be charged the docket fee provided for traffic violations bureaus by section 13-32-105, C.R.S., as amended, in addition to such fine.

Rule 11. Application

These rules shall be uniform in all county courts in this state and shall apply to all traffic cases except as limited by Rule 4 herein.

Rule 12. Effective Date

These rules take effect January 10, 1978, and shall apply to violations alleged to have been committed on or after that date.

Rule 13. Citation

These rules shall be known and cited as the Colorado Rules for County Court Traffic Violations Bureaus, or R.T.V.B.

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CHAPTER 29.7

**The Colorado Rules
for Traffic Infractions**

Adopted by the

SUPREME COURT OF COLORADO

December 9, 1982,

Effective January 1, 1983

The Elements of The British Constitution

By
J. H. B. [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

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CHAPTER 29.7

COLORADO RULES FOR TRAFFIC INFRACTIONS

Rule 1. Scope and Purpose

These rules are promulgated pursuant to section 13-6-501 (9), C.R.S., and govern practice and procedures for the handling of noncriminal traffic infractions, which are defined as civil offenses in section 42-4-1701 (1), C.R.S. The purpose of these rules is to provide for the orderly, expeditious, and fair disposition of this class of traffic offenses. For this purpose, the rules apply concepts of both civil and criminal law, as deemed appropriate, to establish informal hearing procedures in the county courts.

Source: Entire rule corrected and effective November 12, 1999.

Rule 2. Application

These rules apply to actions in which only the commission of statutory traffic infractions are charged. In any action in which the commission of a traffic infraction and a criminal offense are alleged in one complaint, all charges shall be returnable and judgment shall be entered pursuant to section 42-4-1708 (1), C.R.S., and the action shall be treated as one proceeding governed by the rules and statutes applicable to the alleged criminal offense.

Source: Entire rule corrected and effective November 12, 1999.

Rule 3. Definitions

The following definitions shall apply in these rules:

(a) "Charging document" means the document commencing or initiating the traffic infraction matter, whether denoted as a complaint, summons and complaint, citation, penalty assessment notice, or other document charging the person with the commission of a traffic infraction or infractions.

(b) "Defendant" means any person charged with the commission of a traffic infraction, including but not limited to the following terms used in the implementing legislation: "cited person," "cited party," "individual," "person charged with a traffic violation," "violation," or "accused."

(c) "Docket fee" means a fee assessed according to the provisions of section 42-4-1710 (2), (3), or (4), C.R.S., or a fee in the same amount as provided in these rules.

(d) "Judgment" means the admission of guilt or liability for any traffic infraction, the entry of judgment of guilt or liability, or the entry of default judgment as used in section 42-4-1709 (7), C.R.S., against any person for the commission of a traffic infraction.

(e) "Officer" means a law enforcement agent who tenders or serves a charging document under these rules.

(f) "Penalty" means a fine pursuant to sections 42-4-1701 (4) (a) and 42-4-1710, C.R.S., if the charging document is a penalty assessment notice; or a fine pursuant to sections 42-4-1701 (3) (a) (I) and 42-4-1701 (5) (c) (II), C.R.S., if the charging document is any document other than a penalty assessment notice.

(g) "Referee" means any person appointed as a referee under section 13-6-501, C.R.S., and any judge acting as a referee to hear traffic infractions.

Source: (c), (d), and (f) corrected and effective November 12, 1999; (f) corrected and effective November 30, 1999.

Rule 4. Commencement of Action

(a) An action under these rules is commenced by the tender or service of a charging document upon a defendant and by the filing of a charging document with the court.

Rule 5. Prohibition of Plea Agreements

Repealed June 16, 1988, effective January 1, 1989.

Rule 6. Payment Before Appearance

(a) The clerk of court shall accept payment of a penalty assessment notice by a defendant without an appearance before the referee, if payment is made before the time scheduled for the first appearance.

(b) At the time of payment, the defendant shall sign a waiver of rights and acknowledgment of guilt or liability, as set forth in Form A in the appendix to these rules, pay a docket fee, and agree to complete any additional court ordered sanction.

(c) This procedure shall constitute an entry and satisfaction of judgment.

Source: (b) amended and effective September 7, 2006; (a) amended and effective June 16, 2011.

Rule 7. First Hearing

(a) If the defendant has not previously acknowledged guilt or liability and satisfied the judgment, he shall appear before the referee at the time scheduled for first hearing.

(b) The defendant may appear in person or by counsel, who shall enter appearance in the case, providing, however, if an admission of guilt or liability is entered, the referee may require the presence of the defendant for the assessment of the penalty.

(c) If the defendant appears in person, the referee shall advise him in open court of the following:

(1) The nature of the infractions alleged in the charging document;

(2) The penalty and docket fee that may be assessed and the penalty points that may be assessed against the driving privilege;

(3) The consequences of the failure to appear at any subsequent hearing including entry of judgment against the defendant and reporting the judgment to the state motor vehicle division, which may assess points against the driving privilege and may deny an application for a driver's license;

(4) The right to be represented by an attorney at the defendant's expense;

(5) The right to deny the allegations and to have a hearing before the referee;

(6) The right to remain silent, because any statement made by the defendant may be used against him;

(7) Guilt or liability must be proven beyond a reasonable doubt;

(8) The right to testify, subpoena witnesses, present evidence, and cross-examine any witnesses for the state;

(9) Any answer must be voluntary and not the result of undue influence or coercion on the part of anyone; and

(10) An admission of guilt or liability constitutes a waiver of the foregoing rights and any right to appeal.

(d) The defendant personally or by counsel shall answer the allegations in the charging document either by admitting guilt or liability or by denying the allegations.

(e) If the defendant admits guilt or liability, the referee shall enter judgment and assess the appropriate penalty and the docket fee, after determining that the defendant understood the matters set forth in Rule 7(c) and has made a voluntary, knowing, and intelligent waiver of rights.

(f) If the defendant denies the allegations, the matter shall be set for final hearing, and the defendant and officer shall be notified.

Rule 8. Discovery

(a) Discovery shall not be available prior to final hearing.

(b) At the time of final hearing, the defendant is entitled to inspect all documents prepared by the officer which the officer intends to use in the presentation of evidence.

Rule 9. Subpoena

(a) A subpoena shall be issued only for the attendance of a witness or for the production of documentary evidence at final hearing.

(b) A subpoena shall be issued to any county within the state either by the clerk of court at the request of the officer or the defendant, or by counsel who has entered an appearance in the case.

(c) The service of a subpoena shall be by first class mail, if the person to whom it is directed waives personal service, as provided in Form B in the appendix to these rules. No fees or mileage need be tendered with service by mail.

(d) If the person to whom a subpoena is directed does not waive personal service, the issuance and service of a subpoena shall be as provided in Rule 345, C.R.C.P., except as otherwise provided in this rule.

Rule 10. Dismissal Before Final Hearing

(a) Except as provided in Rule 15, the charges shall be dismissed with prejudice if the officer fails to appear at the final hearing.

(b) The charges shall be dismissed if the final hearing is not held within six months from the defendant's answer, pursuant to the provisions of section 42-4-1710 (3), C.R.S.

Source: (b) corrected and effective November 12, 1999.

Rule 11. Final Hearing

(a) The hearing of all cases shall be informal, the object being to dispense justice promptly and economically. The referee shall ensure that evidence shall be offered and questioning shall be conducted in an orderly and expeditious manner and according to basic notions of fairness. The referee may call and question any witness consistent with the referee's obligation to be an impartial fact finder favoring neither the state nor the defense.

(b) The order of proceedings at the hearing shall be as follows:

(1) Before commencement of the hearing, the referee shall briefly describe and explain the purposes and procedures of the hearing.

(2) The officer shall offer sworn testimony and evidence to the facts concerning the alleged infraction. After such testimony, the referee and the defendant or counsel may examine the officer.

(3) Thereafter, the defendant may offer sworn testimony and evidence and shall answer questions, if such testimony is offered, as may be asked by the referee.

(4) If the testimony of additional witnesses is offered, the order of testimony and the extent of questioning shall be within the discretion of the referee.

(5) Upon the conclusion of such testimony and examination, the referee may further examine or allow examination and rebuttal testimony and evidence as deemed appropriate.

(6) At the conclusion of all testimony and examination, the defendant or counsel shall be permitted to make a closing statement.

(c) The Colorado Rules of Evidence do not apply to hearings under these rules.

Rule 12. Judgment After Final Hearing

(a) If all elements of a traffic infraction are proven beyond a reasonable doubt, the referee shall find the defendant guilty or liable and enter appropriate judgment.

(b) If any element of a traffic infraction is not proven beyond a reasonable doubt, the referee shall dismiss the charge and enter appropriate judgment, provided, however, that the referee may find the defendant guilty of or liable for a lesser included traffic infraction, if based on the evidence offered, and enter appropriate judgment.

(c) If the defendant is found guilty or liable, the referee shall assess the appropriate penalty and the docket fee, and any additional costs authorized by section 13-16-122 (1), C.R.S., and order the completion of any additional court ordered sanctions.

(d) The judgment shall be satisfied upon payment to the clerk of the total amount assessed as set forth above and performance of additional sanctions.

(e) If the defendant fails to satisfy the judgment in the time allowed, such failure shall be treated as a default under section 42-4-1710 (3) or (4), C.R.S. The provisions of Rule 16(d) and (e) shall apply to a default under this rule.

Source: (e) corrected and effective November 12, 1999; (c) and (d) amended and effective September 7, 2006.

Rule 13. Posthearing Motions and Appeal

(a) There shall be no posthearing motions except for a motion to set aside a default judgment as provided in Rule 16.

(b) Appeal procedure shall be according to section 13-6-504, C.R.S., and Rule 37, Crim. P.

Rule 14. Venue

Venue shall be as provided by statute.

Rule 15. Continuances

Continuances may be granted on a showing of good cause by the officer, his supervisor, or the defendant.

Rule 16. Default

(a) If the defendant fails to appear for any hearing, the referee shall enter judgment against the defendant.

(b) The amount of the judgment shall be the appropriate penalty assessed after a finding of guilt or liability, the docket fee, and any additional costs assessable under these rules.

(c) The referee may set aside a judgment entered under this rule on a showing of good cause or excusable neglect by the defendant. A motion to set aside the judgment shall be made to the court not more than seven calendar days after entry of judgment.

(d) The defendant may satisfy a judgment entered under this rule by paying the clerk and providing proof of compliance with any additional court orders.

(e) No warrant shall issue for the arrest of a defendant who fails to appear at a hearing or fails to satisfy a judgment.

Source: (d) amended and effective September 7, 2006.

Rule 17. Effective Date

These rules take effect January 1, 1983, and shall apply to traffic infractions alleged to have been committed on or after that date.

Rule 18. Title

These rules shall be known and cited as the Colorado Rules for Traffic Infractions, or C.R.T.I.

APPENDIX TO CHAPTER 29.7

**The Colorado
Rules for
Traffic Infractions**



APPENDIX TO CHAPTER 29.7

FORMS

Forms of captions are consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

SPECIAL FORM INDEX

- Form A. Waiver of Rights and Admission of Guilt or Liability
Form B. Subpoena by First-class Mail
-
-

Form A

WAIVER OF RIGHTS AND ADMISSION OF GUILT OR LIABILITY UNDER THE COLORADO RULES FOR TRAFFIC INFRACTIONS (Rule 6, C.R.T.I.)

You have been accused of violating the traffic infraction laws of the State of Colorado. A simplified procedure is available for the payment of any fines if you voluntarily admit your guilt or liability after being advised of the following rights.

You have the right to:

1. Be represented by an attorney at your own expense;
2. Remain silent because any statement you make may be used against you;
3. Deny the allegations against you and have a hearing, at which the allegations must be proven beyond a reasonable doubt;
4. Testify at your own choosing, subpoena witnesses, present evidence, and cross-examine witnesses for the state;
5. Appeal a judgment against you.

Any answer you make must be voluntary and not the result of undue influence, and you must understand that points may be assessed against your driving records if you admit guilt or liability.

Admission of Guilt or Liability

I have read or been advised of the rights described above. I hereby waive these rights and voluntarily admit my guilt or liability.

Date

Signature

Please Note Carefully

Your failure EITHER to sign the above and pay the clerk the fine and costs OR to appear as directed in your notice will result in a judgment against you. The judgment will be reported to the state Motor Vehicle Division, which may assess points against your driving record and delay your application for a driver's license until you have paid the court the full amount of the judgment against you.

Form B

SUBPOENA BY FIRST-CLASS MAIL
(Rule 9, C.R.T.I.)

Instructions:

In order to obtain a subpoena in a traffic infraction matter, please follow the steps below:

1. Fill out the information required on the subpoena and post card waiver form, including your address for returning the post card waiver.
2. Place a stamp in the proper amount on the post card waiver form.
3. Ask the clerk of court to issue the subpoena by signing it and affixing the court seal.
4. Mail the subpoena with the post card, first-class mail, to the person subpoenaed.
5. If the person subpoenaed refuses to waive personal service, as provided by the post card, you may request the clerk of court to issue a subpoena for personal service.

<div><input type="checkbox"/> County Court _____ County, Colorado</div> <div>Traffic Infraction Matter</div> <div>Court Address:</div>	
TO:	
Attorney or Party Without Attorney (Name and Address):	
<div>Phone Number: E-mail:</div> <div>FAX Number: Atty. Reg. #</div>	<div>▲ COURT USE ONLY ▲</div> <div>Case Number:</div> <div>Division: Courtroom:</div>
SUBPOENA or SUBPOENA DUCES TECUM	

You are ordered to attend and give testimony in Division _____ of _____ County Court at _____ (location) on _____ (date and time), between the PEOPLE OF THE STATE OF COLORADO and _____, defendant, and also to produce at this time and place, if applicable,

now in your control. Please sign and return immediately the enclosed post card waiving personal service.

Date

Clerk or Deputy Clerk

Post card waiver:

PLEASE SIGN AND MAIL IMMEDIATELY

Division _____ County Court

I waive personal service and accept service of the attached subpoena and order in the above case. I will appear as ordered.

Home Phone: _____

Work Phone: _____

Signature of Witness

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CHAPTER 30

**The Colorado
Municipal Court
Rules of Procedure**

**Amended and Adopted by the
SUPREME COURT OF COLORADO**

June 30, 1988,

Effective January 1, 1989

THE
HISTORY OF
THE
CITY OF
BOSTON

BY
JOHN H. COLEMAN
OF THE
BOSTON PUBLIC LIBRARY
AND
OF THE
BOSTON SOCIETY OF THE
HISTORY OF THE CITY

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CHAPTER 30

COLORADO MUNICIPAL COURT RULES OF PROCEDURE

Cross references: For municipal courts generally, see article 10 of title 13, C.R.S.

Law reviews: For article, "Municipal Courts in Colorado: Practice and Procedure", see 38 Colo. Law. 39 (December 2009).

Rule 201. Scope

These rules shall govern the procedure in all municipal charter and ordinance violation cases.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Municipal court rules of procedure are applicable to home-rule municipal courts. Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972).

Nature of case determines which rules apply. It is the nature of the case, and not the court in which the case is being tried, that determines whether the municipal court rules or the rules of criminal procedure apply. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules apply in trial de novo for violation of ordinance. The municipal court rules, and not the rules of criminal procedure, apply in a trial

de novo in the county court for violation of a municipal ordinance. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Absent rules, power exercised in court's discretion. The absence of procedural rules as to exercise of power to permit the consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made, does not destroy the power, but merely indicates that the manner of its exercise rests in the sound discretion of the court. Paukovich v. County Court, 44 Colo. App. 208, 615 P.2d 54 (1980).

Rule 202. Purpose and Construction

These rules are intended to provide for the just determination of all municipal charter and ordinance violations. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Applied in Patterson v. Cronin, 650 P.2d 531 (Colo. 1982).

Rule 203. Definitions

As used in these rules, the following terms shall have the following meanings:

- (a) "Complaint" means a written statement of the essential facts constituting a violation;
- (b) "Law" includes municipal charters and ordinances, statutes, and judicial decisions;
- (c) "Oath" includes affirmations;
- (d) "Peace officer" means a duly appointed law enforcement officer of the state of

Colorado or any political subdivision thereof, authorized by the constitution, statutes, charter, or ordinances to enforce municipal charter and ordinance violations;

(e) "Prosecution" means the prosecutor, if present, or the complaining witness, if the prosecutor is not present;

(f) "Prosecutor" means an attorney representing the municipality in a municipal court;

(g) "Summons" means a notice to appear before the court;

(h) "Summons and complaint" means a single document containing all the requisites of both a summons and a complaint.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 204. Simplified Procedure for Trial of Municipal Charter and Ordinance Violations

The following simplified procedure shall apply:

(a) Initiation of Prosecution.

(1) Prosecution of a violation under simplified procedure shall be commenced by:

(I) The issuance of a summons and complaint;

(II) The issuance of a summons following the filing of a complaint;

(III) The filing of a complaint following an arrest; or

(IV) The filing of a summons and complaint following arrest.

(b) Summons, Summons and Complaint — By Whom Issued; How Served; Failure to Appear; Contents; Amendment.

(1) **Summons.** Summons is issued by the clerk of the court following the filing of a sworn complaint when it appears from the complaint that there is probable cause to believe that a violation has been committed and that the defendant committed it. The summons need only contain the name of the defendant, the date, time, and place of appearance of the defendant. A copy of the complaint shall be served therewith, and a copy of the summons and the complaint shall be supplied to the prosecutor.

(2) **Warrant.** In lieu of a summons a warrant may be issued at the discretion of the court following the filing of a sworn complaint.

(3) **Summons and Complaint.** A summons and complaint may be issued by a peace officer for an offense constituting a violation which was committed in the peace officer's presence or, if not committed in the peace officer's presence, when the peace officer has reasonable grounds for believing that the offense was committed in fact and that the offense was committed by the person charged. A copy of the summons and complaint so issued shall be filed immediately with the court before which appearance is required. A second copy shall be supplied to the prosecutor if so requested.

(4) **Contents of Complaint or Summons and Complaint.** The complaint shall contain the name of the defendant; the date and approximate location of the offense; identification of the offense charged, citing the charter or ordinance section alleged to have been violated; and a brief statement or description of the offense charged, which statement or description shall be sufficient if it states the type of offense to which the charter or ordinance relates. The summons and complaint shall contain all the foregoing information and shall also direct the defendant to appear before a specified court at a stated date, time, and place, or in the office of the court clerk or violations bureau as provided in subsection (5) below.

(5) The summons or summons and complaint shall direct the defendant to appear before a specified court at a stated date, time, and place, or to appear or to respond at the office of the court clerk or violations bureau of a specified court at a stated date and time or within a stated period of time after service of said summons or summons and complaint.

(6) Amendment of complaint or summons and complaint. The court may permit a complaint or summons and complaint to be amended as to form or substance at any time prior to trial; the court may permit it to be amended as to form at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(c) Procedure After Initiation of Prosecution by Issuance of Summons or Summons and Complaint Without Arrest. Arraignment shall be conducted at the time of the defendant's first appearance in court in response to the direction to appear contained in the summons or summons and complaint, unless arraignment is continued as provided in Rule 210.

(d) Procedure After Initiation of Prosecution by Issuance of Complaint or Summons and Complaint Following Arrest.

(1) Any person arrested under a warrant issued upon a complaint, unless admitted to bail, shall be taken without unnecessary delay before a judge of the court which issued the warrant and shall be given a copy of the complaint and warrant. The defendant shall at such time be arraigned in accordance with the provisions of Rule 210, unless arraignment is continued as provided therein.

(2) A person arrested without a warrant for an offense constituting a municipal charter or ordinance violation shall either (i) be served with a summons and complaint and admitted to bail or released upon personal recognizance, or (ii) be taken without unnecessary delay before the judge, whereupon a complaint or summons and complaint shall be filed forthwith with the court and a copy served upon the accused person, unless earlier filed and served. The accused person shall at such time be arraigned in accordance with the provisions of Rule 210, unless arraignment is continued as provided therein.

(e) Service of Summons and Complaint. A copy of a summons or summons and complaint issued pursuant to these rules shall be served personally upon the defendant. In lieu of personal service, service may be made by leaving a copy of the summons or summons and complaint at the defendant's usual place of abode with some person over the age of eighteen years residing therein or by mailing a copy to the defendant's last known address by certified mail, return receipt requested, not less than 7 days prior to the time the defendant is required to appear.

(f) Failure to Appear. If a person upon whom a summons or summons and complaint has been served pursuant to this Rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for the person's arrest.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Personal service of parking summons not required. Fundamental principles of due process do not require personal service of parking summonses. *Patterson v. Cronin*, 650 P.2d 531 (Colo. 1982).

As affixing to windshield suffices. The practice of affixing a summons and complaint to the windshield of an unattended motor vehicle is sufficient for the limited purpose of notifying the owner of the motor vehicle of a parking violation. *Patterson v. Cronin*, 650 P.2d 531 (Colo. 1982).

Purpose of section (6)(4) requirement that "identification of the offense charged, citing the charter or ordinance section alleged to have

been violated" is to provide for simplicity in procedure and fairness in administration. *Alessi v. Municipal Court*, 38 Colo. App. 153, 556 P.2d 87 (1976).

Adequate notice of offense. Where the city and municipal court name is printed on the face of a ticket, the section number together with a reference to the "local ordinance" provides adequate notice to the defendant of the offense allegedly violated. *Alessi v. Municipal Court*, 38 Colo. App. 153, 556 P.2d 87 (1976).

As to a "uniform traffic ticket and complaint" containing sufficient information as required for a summons and complaint under this rule, see *Alessi v. Municipal Court*, 38 Colo. App. 153, 556 P.2d 87 (1976).

Applied in *Garcia v. City of Pueblo*, 176 Colo. 96, 489 P.2d 200 (1971).

Rules 205 to 207. No Colorado Rules**Rule 208. Joinder of Offenses and of Defendants**

(a) **Joinder of Offenses.** If several offenses are known to the prosecutor at the time of commencing the prosecution, all such offenses which are subject to the jurisdiction of the municipal court, upon which the prosecutor elects to proceed, must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any such offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution.

(b) **Joinder of Defendants.** Two or more defendants may be charged in the same complaint or summons and complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged on one or more counts together or separately, and all the defendants need not be charged on each count.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 209. No Colorado Rule**Rule 210. Arraignment****(a) In Court.**

(1) Arraignment shall be held upon defendant's first appearance in court, unless defendant is granted a continuance to seek assistance of counsel, to determine which plea to enter, or for other good and sufficient reasons. The court shall advise each defendant of the right to have the arraignment continued upon request for good cause shown, and if no such request is made, the court may proceed with the arraignment.

(2) Arraignment shall be conducted in open court, and the defendant may appear in person or by counsel. If a plea of guilty or nolo contendere is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(3) Upon arraignment, the defendant or counsel shall be furnished with a copy of the complaint or summons and complaint if one has not been previously served.

(4) A defendant appearing without counsel at arraignment shall be advised by the court of the nature of the charges contained in the complaint and of the maximum penalty which the court may impose in the event of a conviction; in addition, the court shall inform the defendant of the following rights:

(I) To bail;

(II) To make no statement, and that any statement made can and may be used against the defendant;

(III) To be represented by counsel, and, if indigent, the right to appointed counsel as applicable;

(IV) To have process issued by the court, without expense to the defendant, to compel the attendance of witnesses in defendant's behalf;

(V) To testify or not to testify in defendant's own behalf;

(VI) To a trial by jury where such right is granted by statute or ordinance, together with the requirement that the defendant, if desiring a jury trial, demand such trial by jury in writing within 21 days after arraignment or entry of a plea; also the number of jurors allowed by law, and of the requirement that the defendant, if desiring a jury trial, tender to the court within 21 days after arraignment or entry of a plea a jury fee of \$25 unless the fee be waived by the judge because of the indigence of the defendant.

(VII) To appeal.

(b) At Office of Court Clerk or Violations Bureau.

(1) Except where arraignment and immediate trial are available, the court, in order to eliminate unnecessary court appearances, may provide that a defendant desiring to enter a plea of not guilty may enter an appearance and such a plea at the clerk's office or violations

bureau, in person or by counsel, and have the case assigned for trial at a future date. The clerk shall furnish notice of such entry of plea to the prosecutor without delay.

(2) Before a plea of guilty is received, the defendant shall be arraigned in court as provided in section (a) above, unless the offense is included in a uniform schedule of fines imposed by the court in accordance with the provisions of subsection (5) below, and the defendant elects such procedure.

(3) Under the conditions specified in subsection (4) herein, a court where authorized may establish a procedure for the payment to the court clerk or violations bureau according to a schedule of fines. In such matters the violations bureau shall act under the direction and control of the court.

(4) Any court subject to these rules may by order, which may from time to time be amended, supplemented, or repealed, designate the violations, the penalties for which may be paid at the office of the court clerk or violations bureau. In no event shall the order of reference, or any amendment or supplement thereto, designate for processing any of the following traffic violations:

(I) Offenses resulting in an accident causing personal injury, death, or appreciable damage to the property of another;

(II) Reckless driving;

(III) Exceeding the speed limit by more than nineteen miles per hour;

(IV) Exhibition of speed or speed contest.

(5) **Schedule of Fines.** The court, in addition to any other notice, by published order to be prominently posted in a place where fines are to be paid, shall specify by suitable schedules the amount of fines to be imposed for violations, designating each violation specifically in the schedules. Such fines shall be within the limits declared by ordinance. Fines and costs shall be paid to, receipted by, and accounted for by the violations clerk or court clerk in accordance with these rules.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a)(4)(VI) amended and adopted December 14, 2011, effective July 1, 2012.

Rule 211. Pleas

(a) **Generally.** A defendant, in person or by counsel, may plead guilty, not guilty, or, with the consent of the court, nolo contendere.

(b) **Pleas of Guilty and Nolo Contendere.** The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all rights set forth in Rule 210 (a)(4) and also determining:

(1) That the defendant understands the nature of the charge and the effect of the plea;

(2) That the plea is voluntary and is not the result of undue influence or coercion on the part of anyone;

(3) That the defendant understands the right to trial by court, or by jury, if applicable, and that the plea waives the right to trial on all issues;

(4) That the defendant understands the possible penalty or penalties.

(c) **Absence of the Defendant.** The court may accept, in the absence of the defendant, any plea entered in writing by the defendant or counsel or orally made by counsel.

(d) **Failure or Refusal to Plead.** If a defendant refuses to plead or if the court refuses to accept a plea of guilty, or a plea of nolo contendere, or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason the arraignment here provided for has not been had, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Although the defendant was advised of several rights and the possible penalties, he was not advised of his constitutional right to be

represented by counsel, and the trial court properly ruled that the municipal court's advisement of the defendant was illegal since it did not

meet the mandatory requirements set forth in this rule. *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

Where the defendant has entered a plea of guilty and later wishes to withdraw such

plea, the burden is on the defendant to present a prima facie case that the plea was not knowingly and understandingly made. *City of Colo. Springs v. Forance*, 776 P.2d 1107 (Colo. 1989).

Rule 212. Pleadings and Motions Before Trial

(a) **Pleadings and Motions.** Pleadings shall consist of the complaint or summons and complaint and pleas of guilty, not guilty, or nolo contendere. All other pleas, demurrers, and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, or as provided in these rules.

(b) **Oral or Written Motions.** All motions shall be oral unless otherwise ordered by the court.

(c) **Defenses and Objections Which May be Raised.** Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(d) **Defenses and Objections Which Must Be Raised.** Defenses and objections based on defects in the institution of the prosecution or in the complaint or summons and complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure thus to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the complaint or summons and complaint to charge an offense shall be noticed by the court at any time during the proceeding.

(e) **Time for Making Motion.** The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(f) **Hearing on Motion.** A motion before trial raising defenses or objections under section (c) or (d) shall be determined before the day of trial unless the court orders that it be deferred for determination at or after the trial of the general issue.

(g) **Effect of Determination.** If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if no plea has previously been made. A plea previously entered shall stand.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 213. Trial Together of Complaints or Summons and Complaints

Subject to the provisions of Rule 214, the court may order two or more complaints or summons and complaints to be tried together if the offenses, and the defendants if there are more than one, could have been joined in a single complaint or summons and complaint. The procedure shall be the same as if the prosecution were under such single complaint or summons and complaint.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 214. Relief From Prejudicial Joinder

If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in a complaint or summons and complaint or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. Upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible. In ruling on

a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 215. No Colorado Rule

Rule 216. Discovery and Inspection

(a) **By Defendant.** Upon the motion of a defendant or upon the court's own motion at any time after the filing of the complaint or summons and complaint the court may order the prosecution to permit the defendant to inspect and copy or photograph any books, papers, documents, photographs, or tangible objects that are within the prosecution's possession and control, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(b) **Witness's Statements.** At any time after the filing of the complaint or summons and complaint, upon the request of a defendant or upon the order of court, the prosecution shall disclose to the defendant the names and addresses of persons whom the prosecution intends to call as witnesses at the hearing or trial, together with any witness statements.

(c) **Irrelevant Matters.** If the prosecution claims that any material or statement ordered to be produced under this rule contains matter which does not relate to the subject matter of the witness's testimony, the court shall order it to deliver the statement for the court's inspection in chambers. Upon such delivery the court shall excise the portions of the statement which do not relate to the subject matter of the witness's testimony, then the court shall direct delivery of the statement to the defendant.

(d) **Statement Defined.** The term "statement" as used in sections (b) and (c) of this Rule in relation to any witness who may be called by the prosecution means:

(1) A written statement made by such witness and signed or otherwise adopted or approved by the witness;

(2) A mechanical, electrical, or other recording, or a transcription thereof, which is a recital of an oral statement made by such witness; or

(3) Stenographic or written statements or notes which are in substance recitals of an oral statement made by such witness and which were reduced to writing contemporaneously with the making of such oral statement.

(e) **Additional Rules.** Municipal courts may make such additional rules for discretionary or mandatory discovery by the defense or by the prosecution as are consistent with these rules and with any applicable law.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Request for production of documents held unreasonable and oppressive. See *Clary v. County Court*, 651 P.2d 908 (Colo. App. 1982).

A municipal court has the discretion to order pretrial discovery of the statements of prosecution witnesses to the extent necessary

to promote judicial economy and fundamental fairness, even though no such power is granted expressly in the rules. *City of Englewood v. Municipal Court*, 687 P.2d 521 (Colo. App. 1984).

Rule 217. Subpoena

(a) **For Attendance of Witnesses — Form — Issuance.** A subpoena shall be issued either by the court or by the clerk of the court or by counsel whose appearance has been entered in the particular case in which the subpoena is sought. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The court or

clerk shall issue a subpoena signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.

(b) **For Production of Documentary Evidence and of Objects.** Upon order of the court which may be issued ex parte, a subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(c) **Service.** Unless service is admitted or waived, a subpoena may be served by any peace officer or any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena may be made by delivering a copy thereof to the person named. Service is also valid if the person named has signed a written admission or waiver of personal service.

(d) **Contempt.** Failure by any person without adequate excuse to obey a subpoena may be deemed a contempt of the court from which the subpoena issued.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rules 218 to 222. No Colorado Rules

Rule 223. Trial by Jury or by the Court

(a) **Trial by Jury.** Trial shall be to the court, unless the defendant is entitled to a jury trial under the constitution, ordinance, charter, or general laws of the state, in which case the defendant shall have a jury, if, within 21 days after arraignment or entry of a plea, the defendant files with the court a written jury demand and at the same time tenders to that court a jury fee of \$25, unless the fee is waived by the judge because of the indigence of the defendant. If the action is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded. A defendant who fails to file with the court the written jury demand as provided above waives the right to a jury trial.

(b) **Numbers of Jurors.** When a jury trial is granted pursuant to section (a) of this Rule, the jury shall consist of three jurors unless a greater number, not to exceed six, is requested by the defendant in the jury demand.

(c) **Trial Without a Jury.** In a case tried without a jury, the court shall make a general finding and in addition on request shall make oral findings of fact and conclusions of law.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a) amended and effective October 12, 2009; (a) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Right to jury trial not abridged by trial forum. The statutory right to a jury trial cannot be abridged on account of the forum in which the petty offense is tried. *City of Aurora ex rel. People v. Erwin*, 706 F.2d 295 (10th Cir. 1983).

Statutory provision on jury trial governs. Inasmuch as the right to a jury trial in petty offenses is a substantive right granted to all citizens of this state, § 16-10-109(2), governs

over section (a) of this rule. *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982).

Prerequisites of a written demand and twenty-five dollar fee for a jury trial do not violate defendant's right to a jury trial or deprive him of equal protection of the laws under the federal constitution. *Christie v. People*, 837 P.2d 1237 (Colo. 1992).

By failing to file a written jury demand and

proceeding to a bench trial with counsel, plaintiff knowingly and intelligently waived his right to a jury trial for purposes of federal firearms

law. Ward v. Tomsick, 30 P.3d 824 (Colo. App. 2001).

Rule 224. Trial Jurors

(a) Summoning and Selecting Prospective Jurors.

(1) Each municipality shall establish a procedure for summoning and selecting prospective jurors, which procedure shall be calculated to provide the defendant with a fair opportunity for obtaining on the jury a representative cross section of the population of the area served by the court.

(2) For the purposes of this rule, the term "area served by the court" means the entire territorial boundaries of the municipality, even if the boundaries encompass portions of more than one county or other political subdivision.

(b) **Challenge to the Array.** No array or panel of any trial jury shall be quashed, nor shall any verdict in any case be set aside or averted, by reason of the fact that the court or jury commissioner has returned such jury or any of them in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return of such jury. All issues of fact arising on any challenge to the array shall be tried by the court.

(c) **Orientation and Examination of Jurors.** An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner or court employee in charge of summoning prospective jurors is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case using applicable instructions if available or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements;

(V) General legal principles applicable to the case including presumption of innocence, burden of proof, definition of reasonable doubt, elements of charged offenses and other matters that jurors will be required to consider and apply in deciding issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The court may, in its discretion, allow the parties or their counsel to supplement the court's interrogation by asking additional questions of prospective jurors. In the discretion of the judge, juror questionnaires, poster boards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business, in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during presentation of the case.

(d) Challenges for Cause.

(1) Challenges for cause may be taken on one or more of the following grounds:

(I) Absence of any qualification prescribed by statute to render a person competent as a juror except that, for the purpose of this rule, any requirement that a prospective juror be a resident of a the county shall be deemed satisfied if the prospective juror is a resident of the area served by the court as defined in section (a)(2) of this rule;

(II) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(III) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or associated in business with, or surety on any bond or obligation for, any defendant;

(IV) The juror is or has been a party adverse to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

(V) The juror has served on any investigatory body which inquired into the facts of the offense charged;

(VI) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(VII) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(VIII) The juror was a witness to any matter related to the crime or its prosecution;

(IX) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgment of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court;

(XI) Repealed.

(XII) The juror is an employee of a public law enforcement agency or public defender's office.

(2) If either party desires to introduce evidence, other than the sworn responses of the prospective juror, for the purpose of establishing grounds to disqualify or challenge the juror for cause, such evidence shall be heard and all issues related thereto shall be determined by the court out of the presence of the other prospective jurors. All matters pertaining to the qualifications and competency of the prospective jurors shall be deemed waived by the parties if not raised prior to the swearing in of the jury to try the case, except that the court for good cause shown or upon a motion for mistrial or other relief may hear such evidence during the trial out of the presence of the jury and enter such orders as are appropriate.

(e) Peremptory Challenges and Manner of Exercise. Unless otherwise ordered by the court, the jury shall be impaneled as follows: The box shall be filled with prospective jurors exceeding by six the number of jurors requested by the defendant pursuant to Rule 223 (b) above. Prospective jurors shall be sworn, voir dire examination conducted, and challenges for cause taken and determined. Jurors excused by virtue of successful challenge for cause shall be replaced and replacements sworn, examined, and subjected to challenge for cause. When there are no remaining jurors subject to challenges for cause, the prosecution and defendant each shall be entitled to three peremptory challenges, all of which must be exercised either orally or by striking names from a list prepared by the court, and to be exercised alternatively by the parties commencing with the prosecution. In any case where there are multiple defendants, each side shall have an additional peremptory challenge for each defendant after the first, but not to exceed ten. The number of jurors called to the box in cases involving multiple defendants shall be consistent with the number of peremptory challenges permitted to be exercised.

(f) Alternate jurors. The court may, on its own motion or on the motion of either the prosecution or defense, direct that not more than one alternate juror be impaneled. Such

juror shall have the same qualifications, shall be subject to the same examination and challenges, and shall have the same functions, powers, facilities and privileges as the regular jurors.

(g) Custody of Jury.

(1) The court should only sequester jurors in extraordinary cases. Otherwise, jurors should be permitted to separate during all trial recesses, both before and after the case has been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be given to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff or other person designated by the court whenever that are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.

(h) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (c) repealed and readopted with amendments, (d)(1)(XI) repealed, and (g)(1) amended and adopted June 10, 1999, effective July 1, 1999; (h) added and adopted April 3, 2003, effective July 1, 2004.

Rule 225. Disability of Judge

If by reason of absence, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties. But if the substitute judge is satisfied that those duties cannot be performed because the judge did not preside at the trial, or for any other reason, a new trial may be granted.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 226. No Colorado Rule

Rule 227. Proof of Official Record

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Cross references: For proof of official records in civil actions, see C.R.C.P. 44.

Rule 228. No Colorado Rule

Rule 229. Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court, on motion of a defendant or on its own motion, shall order the entry of judgment of acquittal of one or more offenses charged in the complaint or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the prosecution's evidence is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the prosecution's case.

(b) **Reservation of Decision on Motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion after Verdict or Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment or acquittal may be made or renewed within 14 days after the jury is discharged or within such further time as the court may fix during the 14-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that such a similar motion has been made prior to the submission of the case to the jury.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (c) amended and adopted December 14, 2011, effective July 1, 2012.

Rule 230. Instructions

The court shall disclose to the parties the instructions which it intends to give to the jury. At the same time, parties may tender instructions in duplicate, one copy of which shall be submitted to the opposite party, who shall make objection thereto if so desired. All instructions to the jury shall be given orally by the judge before argument. If the court is a court of record, a record shall be made of all objections to the proposed instructions of the court, and all instructions tendered by the parties and refused by the court shall be filed with the clerk with the endorsement of the action of the court.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 231. Verdict

(a) Submission and Finding.

(1) **Form of Verdict.** Before the jury retires the court shall submit to it written forms of verdict for its consideration.

(2) **Retirement of Jury.** When the jury retires to consider its verdict, the bailiff or other person designated by the court shall be sworn or affirmed to conduct the jury to some private and convenient place, and to the best of that person's ability to keep the jurors together until they have agreed upon a verdict. The bailiff or other person designated by the court shall not speak to any juror about the case except to ask if a verdict has been reached, nor shall that person allow others to speak to the jurors. When they have agreed upon a verdict, which shall be unanimous and signed by the foreman, the bailiff or other person designated by the court shall return the jury into court. In any case in which the jury agrees upon a verdict during a recess or adjournment of court for the day, it shall seal its verdict, which shall be retained by the foreman to be delivered to the judge at the opening of the court, and thereupon the jury may separate to meet in the jury box at the opening of the court. Such a sealed verdict shall be received by the court as the lawful verdict of the jury.

(b) **Several Defendants.** If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) **Poll of Jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 232. Sentence and Judgment

(a) **Sentence.** Sentence shall be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or may continue or alter the bail. Before

imposing sentence the court may direct a pre-sentence investigation by a probation officer and a report filed thereby. The court shall, before imposing sentence, afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment. The prosecution shall be given an opportunity to be heard on any matter material to the imposition of sentence.

(b) **Judgment.** A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, and costs if any are awarded against the defendant. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(c) **Costs.** When a judgment for costs is entered in the docket provided for in Rule 255, execution may be had thereon as in civil actions.

(d) **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed.

(e) **Probation.** After conviction of an offense, the defendant may be placed on probation as provided by law.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Grant of allocution mandatory. This rule, granting defendant the right of allocution before imposition of sentence, is mandatory and

should be granted in every case. *Erickson v. City & County of Denver*, 179 Colo. 412, 500 P.2d 1183 (1972).

Rules 233 and 234. No Colorado Rules

Rule 235. Correction or Vacation of Sentence

(a) **Correction of Illegal Sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) **Reduction of Sentence.** The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 91 days (13 weeks) after the sentence is imposed, or (2) within 91 days (13 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 91 days (13 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) **Other Remedies.** A person convicted of a municipal ordinance violation may move the court for post-conviction review on the grounds that said conviction was obtained or sentenced imposed in violation of the constitution of laws of the United States, or of the constitution or laws of this state, or of the municipality's charter or ordinance. Said motion shall be made within six months after the date of conviction unless the applicant can show good cause for the delay.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

A sentence imposed after the municipal court's acceptance of a constitutionally infirm guilty plea is an illegal sentence and the court had authority under this rule to permit the

defendant to withdraw his guilty plea even though sentencing had already taken place. *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

Rule 236. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 237. Appeals

(a) **Appeals From Courts Not of Record.** Appeals from courts not of record shall be in accordance with sections 13-10-116 to 13-10-125, C.R.S. Rulings on motions in such courts are not appealable.

(b) **Appeals From Courts of Record.** Appeals from courts of record shall be in accordance with Rule 37 of the Colorado Rules of Criminal Procedure.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Because appellant's conviction originated in a municipal court of record, appellant had 30 days following the judgment of conviction to file the notice of appeal pursuant to § 13-10-116, this rule, and Crim. P. 37. *Normandin v. Town of Parachute*, 91 P.3d 383 (Colo. 2004).

Transcript of all relevant evidence must be included in record on appeal. Where an appellant challenges a ruling that was based, either in whole or in part, on evidence presented to the

lower court, a transcript of all evidence pertaining to the decision must be included in the record; however, the appellant is not required to include a transcript of evidence that is not relevant to the issues raised on appeal. *Holcomb v. City & County of Denver*, 199 Colo. 251, 606 P.2d 858 (1980).

Applied in *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules 238 to 240. No Colorado Rules

Rule 241. Search and Seizure

(a) **Authority to Issue Warrant.** A judge of any court shall have power to issue a search warrant under this Rule only when:

(1) It relates to a charter or ordinance violation involving a serious threat to public safety or order; and

(2) The violation is not also a violation prohibited by state statute for which a search warrant could be issued by a district or county court.

(b) **Grounds for Issuance.**

(1) A search warrant may be issued to search for and seize property which is located within the municipality and which:

(I) Is designated or intended for use in committing a charter or ordinance violation;

(II) Has been used as a means of committing a charter or ordinance violation; or

(III) The possession of which is prohibited by charter or ordinance.

(2) A search warrant may be issued for the inspection of private premises by an authorized public inspector upon showing that:

(I) The premises are located within the municipality;

(II) The inspection is required or authorized by charter or ordinance in the interest of public safety; and

(III) The owner or occupant of such private premises has refused entry to the public inspector, or the premises are locked and the public inspector has been unable to obtain permission of the owner or occupant to enter. This rule shall not be construed to require the issuance of a warrant for emergency inspections, or in any other case where warrants are not presently required by law.

(c) **Issuance and Contents.** A search warrant shall issue only on affidavit sworn to or affirmed before the judge and establishing the grounds for issuing the warrant. If the judge

is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, the judge shall issue a search warrant identifying the property and naming or describing the person or place to be searched. The search warrant shall be directed to any officer authorized by law to execute it in the municipality wherein the property is located. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for any property specified. The search warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the judge to whom it shall be returned.

(d) **Execution and Return With Inventory.** The search warrant may be executed and returned only within 14 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and receipt for any property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant for the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by unlawful search and seizure may move the municipal court for the municipality where property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

- (1) The property was illegally seized without warrant;
- (2) The warrant is insufficient on its face;
- (3) The property seized is not that described in the warrant;
- (4) There was not probable cause for believing the existence of the grounds on which the warrant was issued;
- (5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention, and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) **Scope and Definition.** This Rule does not modify any statute inconsistent with it regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (d) amended and adopted December 14, 2011, effective July 1, 2012.

Rules 242 and 243. No Colorado Rules

Rule 244. Assignment of Counsel

(a) If the defendant appears in court without counsel, the court shall advise the defendant of the right to retain counsel. In an appropriate case, if, upon the defendant's affidavit or sworn testimony and other investigation, the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent the defendant at every stage of the trial court proceedings. In any case in which counsel must be appointed, the court may appoint law students who shall act under the provisions of C.R.C.P. 226. No lawyer need be appointed for a defendant who, after being advised, with full knowledge of the right to counsel, elects to proceed without counsel.

(b) Whenever two or more defendants have been jointly charged pursuant to Rule 208(b) or have been joined for trial pursuant to Rule 213, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 245. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, the day of the event from which the designated period of time begins to run is not to be included. Thereafter, every day shall be counted including holidays, Saturdays, and Sundays. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. As used in these Rules, "legal holiday" includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) **Enlargement.** When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion:

(1) Upon motion, with or without notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order; or

(2) Upon motion permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect.

(c) Repealed.

(d) **For Motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereon, shall be served not later than 7 days before the time specified for the hearing, unless a different period is fixed by rule or order of court. For cause shown, such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing, unless otherwise ordered by the court.

(e) Repealed.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a) and (d) amended and (c) and (e) repealed and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For article, "'Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines", see 41 Colo. Law. 33 (January 2012).

Rule 246. Bail

(a) **Right to Bail.** All persons shall be bailable by sufficient sureties as provided in the constitution of the state of Colorado, in this Rule, and in local rules not inconsistent therewith.

(1) **Before Conviction.** If a judge is not immediately available for purposes of admission to bail of persons arrested and brought to the court or jail on charges of committing a municipal charter or ordinance violation, such persons may be admitted to bail, pursuant to court rule, by the clerk or other responsible and appropriate officer designated by the court. The court shall provide by rule for the conditions and circumstances under which such admission to bail will be granted pending appearance before the judge. The primary condition of the bail bond, and the only condition for a breach of which a surety or security on the bond may be subjected to forfeiture, is that the released person appear to answer the charged at a place and upon a date certain and at any place or upon any date to which the proceeding may be transferred or continued. In addition to the primary condition, the court may impose reasonable additional conditions upon the conduct of the defendant. Bail so required may be, at the election of the accused, in the form of cash, security, real property, tangible or intangible personal property, an acceptable corporate surety bond, or adequate or acceptable private sureties. In cases when so permitted under the Rules promulgated pursuant to this section (a), bail may be upon personal recognizance without security or surety.

(2) **After Conviction.** Bail may be allowed in arrest of judgment or during any stay of execution or pending appeal or review by a higher court, unless it appears the review is sought on frivolous grounds or is taken for delay. Pending appeal or review by the Supreme Court, bail may be allowed by the municipal court, the appellate judge, or by the Supreme Court or a justice thereof. Any court or any judge or justice granting bail may at any time alter or revoke the order admitting the defendant to bail.

(b) **Amount.** A defendant shall be admitted to bail in an amount which in the judgment of the court, judge, or justice will insure the defendant's presence. If fine and costs have been imposed, a deposit in the amount thereof or the posting of a bond for the payment thereof may be required by the trial court.

(c) **Form and Place of Deposit.** A person permitted to give bail shall execute a bond to appear in court on a designated day, or on the first day of the next term of court, and from day to day thereafter, as the court may deem appropriate. One or more sureties may be required or the defendant may furnish cash security or, in the discretion of the court, no security or surety need be required. If bond is made in a place other than the clerk's office, the bond shall be transferred to and deposited in the clerk's office.

(d) **Forfeiture.**

(1) **Declaration.** If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail.

(2) **Setting Aside.** The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) **Enforcement When Forfeiture Not Set Aside.** By entering into a bond each obligor, whether the principal or a surety, submits to the jurisdiction of the court. Liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered forthwith and execution issue thereon. Said citation shall issue promptly may be served personally or by first class mail upon the obligor directed to the addresses given in the bond. Hearing on the citation shall be held not less than 21 days after service. The defendant and the prosecution shall be given notice of the hearing. At the conclusion of the hearing, the court may enter a judgment against the obligor, and execution shall issue thereon as on other judgments.

(4) **Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this section (d). If a bond forfeiture has been paid into the general fund of the municipality, the appropriate city or town official shall be notified of the order for remission.

(5) **Meaning of "Court".** Wherever used in section (d) the word "court" means a court in which a principal has undertaken by bond to appear.

(e) **Exoneration.** The obligor shall be exonerated as follows:

(1) When the condition of the bond has been satisfied;

(2) When the amount of the forfeiture has been paid; or

(3) Upon surrender of the defendant into custody before judgment upon an order to show cause and upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to a peace officer within the municipality wherein the bond shall be taken, and it is the duty of such peace officer, on such surrender and delivery of a certified copy of the bond by which the surety is bound, to take such person into custody, and to acknowledge such surrender in writing.

(f) **Continuation of Bonds.** In the discretion of the court and with the consent of the surety or sureties, the same bond may be continued until the final disposition of the case in the court or pending disposition of the case on appeal or review.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (d)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 247. No Colorado Rule

Rule 248. Dismissal

(a) **By the Prosecution.** No case pending in any court shall be dismissed or a nolle prosequi therein entered by the prosecution, unless upon a motion in open court and with the court's consent and approval. Such a motion shall be supported by a statement concisely stating the reasons for the action. Such a dismissal may not be entered during the trial without the defendant's consent.

(b) **By the Court.** If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 91 days (13 weeks) after the arraignment of the defendant, or unless the delay is occasioned by the action or request of the defendant, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except that if on the day of a trial set within the last 7 days of the above time limit a necessity for a continuance arises which the court in the exercise of sound judicial discretion determines would warrant an additional delay, then one continuance, not exceeding 28 days, may be allowed, after which the dismissal shall be entered as above provided if trial is not held within the additional time allowed.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Mandatory limit to initiate prosecution. "Unnecessary delay" in section (b) does not merely codify the defendant's basic constitutional right to a speedy trial, since the reference to 90 days, rather than being a guideline for the court's discretion, is a mandatory limit. *Bachicha v. Municipal Court*, 41 Colo. App. 198, 581 P.2d 746 (1978).

Delay caused by defendant. The defendant may not whipsaw the court between its obligation to protect his right of confrontation and his right to a speedy trial. When, as a result of defendant's actions, the court cannot determine whether he has waived his right to be present at trial, it is clear that defendant has delayed proceedings within the meaning of this rule.

Crandall v. Municipal Court ex rel. City of Sterling, 650 P.2d 1324 (Colo. App. 1982).

Where defendant requested a pretrial conference for the purpose of achieving a disposition of his case without going to trial, and agreed to the terms of the disposition, defendant could not complain of the delay occasioned by his unsuccessful efforts to meet the conditions for disposition. *Alley v. Kal*, 44 Colo. App. 561, 616 P.2d 191 (1980).

Right to speedy trial under this rule violated where defendant is not brought to trial in county court within 90 days of filing of appeal requesting a trial de novo. *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

The computation of the speedy trial period begins from the entry of the last not-guilty plea. *People of City of Aurora v. Allen*, 885 P.2d 207 (Colo. 1994).

If the charges brought against the defendant are dismissed without prejudice, they become a nullity. Dismissal of all the charges is a final judgment on the case. If and when the defendant is arraigned under a subsequent information, the speedy trial period begins anew, even if the charges are identical. *People of City of Aurora v. Allen*, 885 P.2d 207 (Colo. 1994).

Speedy trial is tolled while an appeal is pending. *People of City of Aurora v. Allen*, 885 P.2d 207 (Colo. 1994).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. *Hills v. Westminster Mun. Court*, 245 P.3d 947 (Colo. 2011).

Rule 249. Service and Filing of Papers

(a) **Service — When Required.** Written motions other than those which are heard *ex parte*, written notices, and similar papers shall be served upon the adverse parties.

(b) **Service — How Made.** Whenever under these rules, or by court order, service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for civil actions unless otherwise ordered by the court.

(c) **Notice of Orders.** Immediately upon entry of any order made out of the presence of the parties and after the complaint or summons and complaint is filed, the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Cross references: For manner of service in civil actions, see C.R.C.P. 5.

Rule 250. No Colorado Rule

Rule 251. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the court ruling or order is made or sought, makes known to the court the court action sought or the objection to the court's action and the grounds therefor. But if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 252. Harmless Error and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 253. Regulation of Conduct in Courtroom

Conduct in the courtroom pertaining to the publication of judicial proceedings shall conform to Canon 3 of the Code of Judicial Conduct, as adopted by the supreme court of Colorado.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 254. No Colorado Rule**Rule 255. Records**

(a) **Docket.** The court or clerk thereof shall keep a record known as the court docket and shall enter thereon each action to which these rules are applicable. Said docket shall be appropriately indexed so that all entries may be readily located.

(b) **Transcript.** A transcript of record in each traffic case wherein the defendant was convicted, as the word "convicted" is used in all statutes and ordinances applicable to the municipal court, shall, upon conclusion of the case, be promptly forwarded to the motor vehicle division of the state department of revenue.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 256. Terms of Court

The presiding judge shall designate, by rule or order, regular times when the court shall be open for the transaction of court matters, for the purpose of filing any proper papers, of issuing and returning process, and of making of motions and orders.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 257. Rules of Court

All municipal court local rules, including local municipal procedures and standing orders having the effect of municipal court local rules, enacted before February 1, 1992, are hereby repealed. Each municipal court, by a majority of its judges, may from time to time propose municipal court local rules and amendments of municipal court local rules. Proposed rules and amendments shall not be inconsistent with the Colorado Rules of Municipal Court Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in municipal courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of municipal court local rules is required. Numbering and format of any municipal court local rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. The Supreme Court's approval of a municipal court local rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of a municipal court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of Municipal Court Procedure.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Effect of failure to submit proposed rules to supreme court. The fact that a municipal court had not submitted a proposed rule dealing with amendments to a "summons and complaint" to the Colorado supreme court pursuant to section (a) did not mean that the municipal court was without authority to permit amendments. *Paukovich v. County Court*, 44 Colo. App. 208, 615 P.2d 54 (1980).

Absent rules, power to be exercised in court's discretion. The absence of procedural rules as to the exercise of power to permit the

consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made, does not destroy the power, but merely indicates that the manner of its exercise rests in the sound discretion of the court. *Paukovich v. County Court*, 44 Colo. App. 208, 615 P.2d 54 (1980).

The power to permit the consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made need not be ex-

pressly granted as each is inherently a part of the power to receive and hear such charges. *Paukovich v. County Court*, 44 Colo. App. 208, 615 P.2d 54 (1980).

Rule 258. No Colorado Rule

Rule 259. Effective Date

These Rules take effect on January 1, 1989. Amendments take effect on the date indicated. They govern all proceedings in municipal charter and ordinance violations brought after they take effect and also in all further proceedings in actions then pending.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Applied in *Municipal Court v. Brown*, 175 Colo. 433, 488 P.2d 61 (1971).

Rule 260. Citation

These Rules for procedure in municipal courts are additions to Colorado Rules of Criminal Procedure, and shall be known and cited as "Colorado Municipal Court Rules" or "C.M.C.R.".

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

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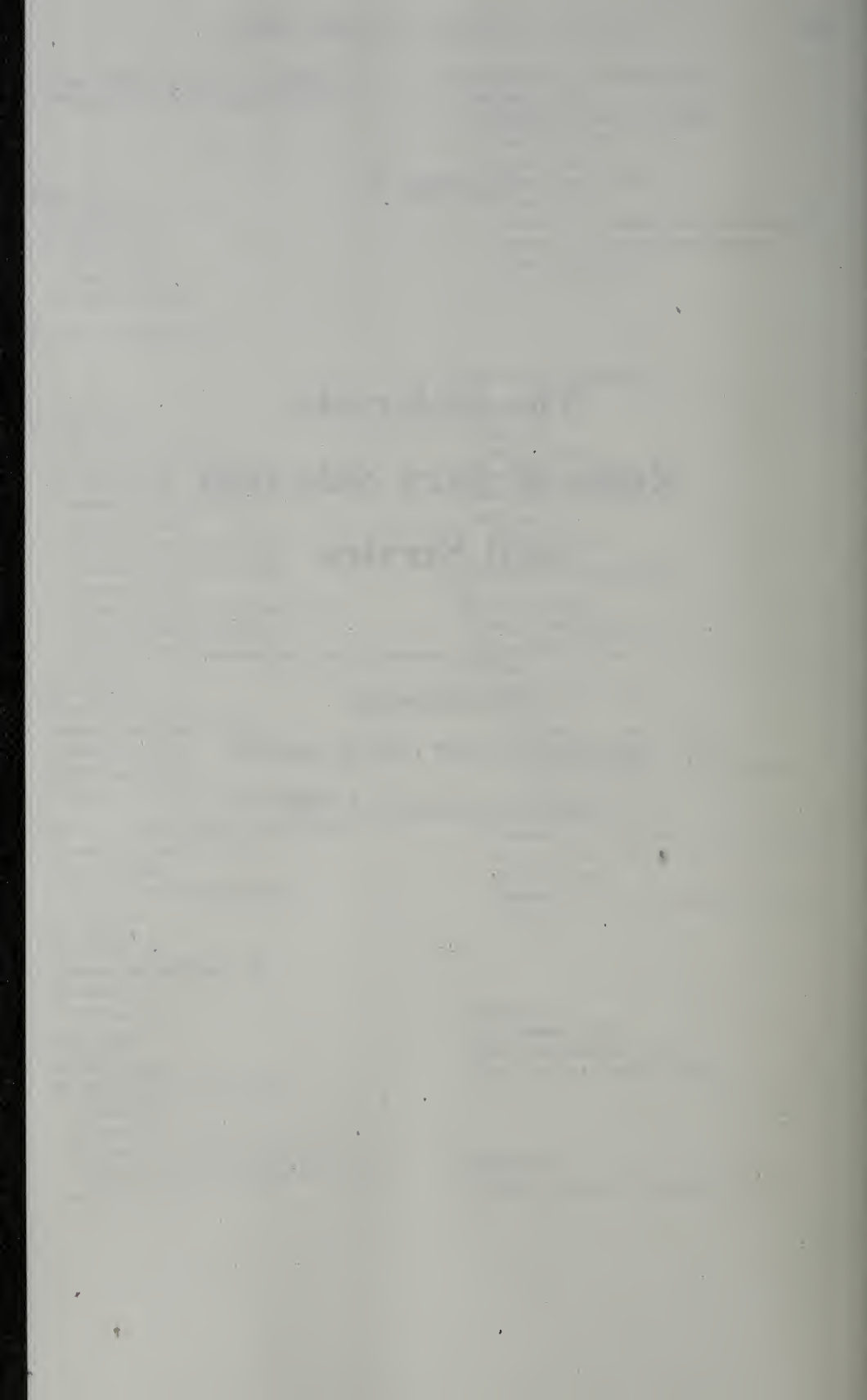
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CHAPTER 31

**The Colorado
Rules of Jury Selection
and Service**

Repealed by the
SUPREME COURT OF COLORADO

Effective November 16, 1995



CHAPTER 32

**The Colorado
Appellate Rules**

Adopted by the
SUPREME COURT OF COLORADO
Effective April 1, 1970,
and as Amended



ANALYSIS BY RULE

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CHAPTER 32

COLORADO APPELLATE RULES

Cross references: For the supreme court, see article 2 of title 13, C.R.S.; for the court of appeals, see article 4 of title 13, C.R.S.

APPLICABILITY OF RULES

1. These rules of appellate procedure are intended to embrace appeals of both criminal and civil matters. The appeal replaces the writ of error.

2. Rules 1 through 48, except where specifically noted otherwise, apply to appeals to either the supreme court or to the court of appeals. Whenever "appellate court" is used it refers to either court. Whenever in these rules the supreme court or court of appeals is referred to specifically the rule shall apply to procedure in that court and no other, e.g., C.A.R. 4.1.

3. As near as practicable these rules are patterned on the Federal Rules of Appellate Procedure for the United States Courts of Appeal as of July 1, 1968. However, several of the rules peculiarly apply to procedure in the state practice.

4. Procedure for invoking original jurisdiction of and for remedial writs in the supreme court are embraced in Rule 21 and 21.1. Certiorari proceedings to the supreme court from the court of appeals or from the district court when applicable are embraced in Rules 49 through 57.

ANNOTATION

Law reviews. For article, "Colorado Appellate Rule Changes: A Commentary", see 12 Colo. Law. 1927 (1983).

Colorado Appellate Rules are patterned directly on the Federal Rules of Appellate Procedure. *Alvarez v. Carpenter*, 347 F. Supp. 597 (D. Colo. 1972).

Rule-making authority of supreme court. The supreme court has authority to adopt rules

for the regulation of the business of the courts and the procedure to be followed by litigants in doing that business. Nonetheless, absent constitutional authority, the supreme court cannot adopt a rule which changes jurisdiction of a court contrary to a provision of a statute. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Rule 1. Scope of Rules

(a) **Matters Reviewable.** An appeal to the appellate court may be taken from:

(1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

(2) A judgment and decree, or any portion thereof, in a proceeding concerning water rights; and an order refusing, granting, modifying, cancelling, affirming or continuing in whole or in part a conditional water right, or a determination that reasonable diligence or progress has or has not been shown in an enterprise granted a conditional water right;

(3) An order granting or denying a temporary injunction;

(4) An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver.

(b) **Limitation on Taking Appeals.** The taking of appeals shall be in accordance with these rules except for special proceedings in which a different time period is set by statute for the taking of an appeal.

(c) **Appeal Substitute for Writs of Error.** Matters designated by statute to be reviewable by writ of error shall be reviewed on appeal as herein provided.

(d) **Ground for Reversal, etc.** Each party in this brief required by C.A.R. 28 (a) shall state clearly and briefly the grounds upon which he relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders, or rulings of the trial court. He will be limited to the grounds so stated although the court may in its discretion notice any error appearing of record. When an appeal has been taken, it shall not be dismissed upon motion of an appellant without notice to all interested parties whose appearances have been entered in the appellate court, and order of the court permitting such dismissal; if dismissal is objected to by any such interested party, he may, in the court's discretion, seek reversal, modification, or correction of the judgment.

(e) **Review of Water Matters.** The notice of appeal (see C.A.R. 4) for review of the whole or any part of a judgment and decree or order as defined in subsection (a)(2) of this Rule shall designate as appellant the party or parties filing the notice of appeal and as appellee all other parties whose rights may be affected by the appeal and who in the trial court entered an appearance, by application, protest, or in any other authorized manner. If not an appellant, the division engineer shall be an appellee; provided that upon application, a dismissal may be entered as to the division engineer in the absence of objection made by any party to the appeal within ten days from the mailing to such party of such application. The notice of appeal shall describe the water rights with sufficient particularity to apprise each appellee of the issues sought to be reviewed. The notice of appeal shall otherwise comply with the requirements of C.A.R. 3(d).

Cross references: As to time limit for filing of notice of appeal and extension of such time, see C.A.R. 4; for time period for transmission of record, see C.A.R. 11; for requirements and contents of briefs, see C.A.R. 28; for enlargement of time limits in general, see C.R.C.P. 6 (b); for provision that party claiming error must move for new trial, see C.R.C.P. 59; for provision exempting special proceedings from the rules of civil procedure, see C.R.C.P. 81; for statutory provisions for review of judgments in criminal cases, see §§ 16-12-101 through 16-12-103, C.R.S.

ANNOTATION

- I. General Consideration.
- II. Matters Reviewable.
 - A. In General.
 - B. Final Judgment.
 - C. Review of Water Matters.
- III. Grounds for Reversal.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Necessity for Writs of Error and Motions for New Trial for a Review in Colorado", see 2 Rocky Mt. L. Rev. 99 (1930). For article, "The Grounds for Reversal of Criminal Cases in Colorado, 1864 to 1948", see 22 Rocky Mtn. L. Rev. 117 (1950). For note, "Colorado Appellate Procedure", see 40 U. Colo. L. Rev. 551 (1968). For article, "Preserving Issues for Appeal", discussing the requirement of an offer of proof, see 20 Colo. Law. 879 (1991). For article, "Perfecting Appeals to the Colorado Court of Appeals", see 21 Colo. Law. 2385 (1992).

Appeal is a matter of right. *Monti v. Bishop*, 3 Colo. 605 (1877); *Hull v. Denver Tramway Corp.*, 97 Colo. 523, 50 P.2d 791 (1935); *Wheeler Kelly Hagny Trust Co. v. Williamson*, 111 Colo. 515, 143 P.2d 685 (1943).

Appeal is adequate remedy to judgment of trial court. If, by any judgment entered by a trial court, the parties feel aggrieved, their rem-

edy by appeal is speedy and altogether adequate for the protection of their rights, and there is no occasion for invoking the original jurisdiction of the supreme court. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958).

Original proceeding may not be substituted for appeal. C.A.R. 21 concerning original proceedings may not be utilized to avoid the requirements of finality of judgments and orders set forth in this rule. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

Original proceedings in the supreme court may not be used as a substitute for appeal. *Douglas v. Municipal Court*, 151 Colo. 358, 377 P.2d 738 (1963); *DeLong v. District Court*, 151 Colo. 364, 377 P.2d 737 (1963).

Nor may writ of habeas corpus. Habeas corpus will not lie where an appeal is adequate and may not be used as a substitute for appeal. *Nickle v. Reeder*, 144 Colo. 593, 357 P.2d 921 (1960); *Medberry v. Patterson*, 142 Colo. 180, 350 P.2d 571 (1960), cert. denied, 368 U.S. 839, 82 S. Ct. 59, 7 L. Ed. 2d 39 (1961).

A party seeking only to affirm a lower court so that its holding may be used as precedent in other cases has not presented adequate grounds for an appeal, because the party is not seeking the reversal, modification, or correction of the holding as required under

subsection (d). *Broomfield v. Farmers Reservoir & Irrigation Co.*, 235 P.3d 296 (Colo. 2010).

Appellant must be party or aggrieved by lower court's decision. One of two tests must be met before a party may prosecute an appeal to the supreme court. He must either be a party to the action or he must be a person substantially aggrieved by the disposition of the case in the lower court. *Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (1961).

Only parties aggrieved may appeal. The word aggrieved refers to a substantial grievance, the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation. *Miller v. Reeder*, 157 Colo. 134, 401 P.2d 604 (1965).

Guarantors of a surety company on a criminal recognizance, who are permitted to intervene in the trial court, and who are the only persons who would suffer loss from a forfeiture, are parties to the record and entitled to seek a review in the supreme court by appeal. *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

The attorney is properly before the supreme court on a motion for fees because he is a party substantially aggrieved by the disposition in the trial court. Equity demands that he be treated as an intervenor and he was so considered by the trial court and the parties because his motion for fees was on behalf of himself and not for the wife. *Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (1961).

Else appellant lacks standing. Where appellants are not proper parties in an action, they have no standing in the court of appeals to question the validity of a judgment. *Duke v. Pickett*, 30 Colo. App. 438, 494 P.2d 120 (1972).

Standing, for purposes of an appeal, means that a party must have alleged an injury in fact and that injury must be to a legally protected or cognizable interest. The right to appeal of a matter of law follows the property interest. *City of Aspen v. Artes-Roy*, 855 P.2d 22 (Colo. App. 1993).

Due process not denied by limitation on filing appeals. Prejudicial irregularity in a trial court proceeding must be asserted by an appeal, and where a party sues out an appeal to review a judgment, and thereafter dismisses the same and because of the lapse of time may not again apply for an appeal, due process of law is not denied. *Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Time limitations are procedural. Limitations of time within which an appeal may be brought is procedural and may be fixed by the supreme court. *Sitler v. Brians*, 126 Colo. 370, 251 P.2d 319 (1952).

Motion for a new trial is a prerequisite to review on appeal in cases involving questions

of law only as well as in cases involving questions of fact. *Colo. State Bd. of Exam'rs of Architects v. Marshall*, 136 Colo. 200, 315 P.2d 198 (1957).

It is mandatory upon the party claiming error to move the trial court for a new trial, unless an order dispensing with same is entered. *Security Bldg. Co. v. Lewis*, 127 Colo. 139, 255 P.2d 405 (1953).

This applies to temporary injunctions. Sections (b) and (f) of C.R.C.P. 59, requiring a motion for a new trial or an order dispensing therewith, apply to appeals brought to determine validity of orders granting or denying temporary injunctions under this rule. *Minshall v. Pettit*, 151 Colo. 501, 379 P.2d 394 (1963); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), aff'd on other grounds, 23 P.3d 1197 (Colo. 2001).

Failure to move for new trial requires dismissal of appeal. Where no motion for new trial was filed, and no order dispensing with such filing was entered, the requirements of this rule were not complied with, and the appeal is accordingly dismissed. *People ex rel. Dunbar v. South Platt Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

In an action on a promissory note where judgment notwithstanding the verdict was entered for plaintiff, and defendant failed to file a motion for a new trial, and the necessity for such a motion was not dispensed with pursuant to C.R.C.P. 59(f), an appeal to review such judgment will be dismissed. *Boyd v. Adjustment Bureau, Inc.*, 148 Colo. 233, 365 P.2d 813 (1961).

As does insufficient motion for new trial. This rule presupposes that a motion for a new trial be filed with the trial court, and an appeal was dismissed where the motion which was filed was couched in such broad and general language that it informed the court that appellants were dissatisfied with the judgment, as if no motion for new trial was ever filed. *Martin v. Opydyke Agency, Inc.*, 156 Colo. 316, 398 P.2d 971 (1965).

Substantial noncompliance with procedure requires dismissal. Where the rules relating to procedure on appeal in the supreme court are ignored or disregarded in substantial particulars, an appeal will be dismissed. *Farrell v. Bashor*, 140 Colo. 408, 344 P.2d 692 (1959).

But strict compliance not necessary where status of children at stake. While a motion may fail to comply strictly with the requirements of C.R.C.P. 59, when the status of minor children is at stake, a court of appeals will notice error in the trial court proceedings, and remand for findings. *In re Brown*, 626 P.2d 755 (Colo. App. 1981).

Supreme court may dismiss an appeal on its own motion where there is no jurisdiction to review the case. *Unzicker v. Unzicker*, 74 Colo.

211, 220 P. 495 (1923); *Diebold v. Diebold*, 74 Colo. 557, 223 P. 46 (1924).

Jurisdiction of district court while appeal pending. Once a case is in the supreme court on appeal, a trial court is without jurisdiction to vacate its judgment or enter another or different judgment. *Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Appellate court must not, upon review, sit as thirteenth juror and set aside a verdict because it might have drawn different conclusion from all evidence. *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972).

If sentences imposed are within statutory bounds, and if they do not shock the conscience of the court, they will not be disturbed on the grounds that they constitute cruel and unusual punishment. *Trujillo v. People*, 178 Colo. 136, 496 P.2d 1026 (1972).

Transfer to court of appeals does not violate rule. Section 13-4-110(2), providing that cases within the jurisdiction of the court of appeals may be transferred from the supreme court, is not void and the statutory procedure is not contrary to this rule. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

There is a recognized distinction between "proceedings" and "special proceedings". *Hewitt v. Landis*, 75 Colo. 277, 225 P. 842 (1924); *Siliter v. Brians*, 126 Colo. 370, 251 P.2d 319 (1952).

Applied in *Graham v. Swift*, 123 Colo. 309, 228 P.2d 969 (1951); *Hart v. Herzig*, 131 Colo. 458, 283 P.2d 177 (1955); *Cline v. McDowell*, 132 Colo. 37, 284 P.2d 1056 (1955); *Addressograph-Multigraph Corp. v. Kelly*, 146 Colo. 550, 362 P.2d 184 (1961); *Schwab v. Martin*, 165 Colo. 547, 441 P.2d 17 (1968); *Reed v. Reed*, 29 Colo. App. 199, 481 P.2d 125 (1971); *People v. Morris*, 190 Colo. 215, 545 P.2d 151 (1976); *In re Gardella*, 190 Colo. 402, 547 P.2d 928 (1976); *Sanderson v. District Court*, 190 Colo. 431, 548 P.2d 921 (1976); *Bd. of Water Works v. Pueblo Water Works Employees Local 1045*, 196 Colo. 308, 586 P.2d 18 (1978); *In re Estate of Dandrea*, 40 Colo. App. 547, 577 P.2d 1112 (1978); *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979); *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980); *Abts v. Bd. of Educ.*, 622 P.2d 518 (Colo. 1980); *Ward v. Indus. Comm'n*, 44 Colo. App. 301, 612 P.2d 1164 (1980); *People in Interest of G.L.*, 631 P.2d 1118 (Colo. 1981); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981); *Schuster v. Zwicker*, 659 P.2d 687 (Colo. 1983); *M.E.G. v. R.B.D.*, 676 P.2d 1250 (Colo. App. 1983).

II. MATTERS REVIEWABLE.

A. In General.

Practice under the former code of civil procedure is analogous to the practice under this rule. *Burks v. Maudlin*, 109 Colo. 281, 124 P.2d 601 (1942).

Appeals are not allowed for mere purpose of delay, or to present purely abstract legal questions, however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. *Miller v. Reeder*, 157 Colo. 134, 401 P.2d 604 (1965).

Jurisdiction cannot be conferred by act of parties. Jurisdiction of an appeal which otherwise does not exist cannot be conferred by act of the parties. *Sons of Am. Bldg. & Inv. Ass'n v. City of Denver*, 15 Colo. 592, 25 P. 1091 (1890); *Bd. of Comm'rs v. McIntire*, 23 Colo. 137, 46 P. 638 (1896).

An appellate court will consider only those questions properly raised by the appealing parties. *Denver United States Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970).

And issues between parties to appeal. Appellate review is limited to a consideration of issues between the parties to an appeal. *Mills v. Saunders*, 30 Colo. App. 462, 494 P.2d 1309 (1972).

Constitutional challenges to sales and use tax provisions of municipal code made to an administrative agency but were not made in declaratory judgment action in district court are not properly preserved for appellate review. *Arapahoe Roofing & Sheet Metal v. Denver*, 831 P.2d 451 (Colo. 1992).

Colorado rules and decisions discourage the review of a cause piecemeal. *Vandy's, Inc. v. Nelson*, 130 Colo. 51, 273 P.2d 633 (1954); *Berry v. Westknit Originals, Inc.*, 145 Colo. 48, 357 P.2d 652 (1960); *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Only section (a) orders are appealable. One seeking review of a judgment or order must bring his case within one of the categories under section (a); otherwise, it is not an appealable order. *Freshpict Foods, Inc. v. Campos*, 30 Colo. App. 354, 492 P.2d 867 (1971).

A denial of a summary judgment motion is not generally considered a final decision that is immediately appealable under this rule. *City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996).

The denial of a motion for summary judgment is not an appealable ruling. *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992).

Temporary restraining order is not appealable. Under this rule an ex parte temporary restraining order entered by the trial court is not an order granting a "temporary injunction" which is subject to review on appeal. *Simpson v. Simpson*, 151 Colo. 88, 376 P.2d 55 (1962).

A temporary restraining order issued under C.R.C.P. 65(b), is not an appealable order under section (a) of this rule. *Freshpict Foods, Inc. v. Campos*, 30 Colo. App. 354, 492 P.2d 867 (1971); *O'Connell v. Colo. State Bank*, 633 P.2d 511 (Colo. App. 1981).

But order granting preliminary injunction is reviewable. An order granting a preliminary injunction restraining the board of optometric examiners from enforcing its regulation is reviewable by appeal. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

Order appointing or overruling motion to discharge a receiver is reviewable on appeal before final judgment. *Boyd v. Brown*, 79 Colo. 568, 247 P. 181 (1926).

This rule provides opportunity to seek a receiver's discharge and have review if the trial court should refuse the request. *Thompson v. Beck*, 92 Colo. 441, 21 P.2d 712 (1933).

An order entered on a motion to discharge a receiver, although intermediate in a sense, is expressly made reviewable on appeal before final judgment. *Melville v. Weybrew*, 108 Colo. 520, 120 P.2d 189 (1941), cert. denied, 315 U.S. 811, 62 S. Ct. 795, 86 L. Ed. 1210, reh'g denied, 315 U.S. 830, 62 S. Ct. 913, 86 L. Ed. 1224 (1942).

But appeal from interlocutory order not mandatory. Although an order granting or denying the appointment of a receiver is appealable as of right, pursuant to this rule, it is not mandatory that an appeal be taken from such an interlocutory order. *Jouffas v. Wyatt*, 646 P.2d 946 (Colo. App. 1982).

If an interlocutory appeal is not taken from an order appointing a receiver, a party may still appeal the subject matter of the interlocutory order upon the entry of a final judgment. *Application of Northwestern Mut. Life Ins. Co.*, 703 P.2d 1314 (Colo. App. 1985).

And matters not disposed of by trial court not considered on review. Where a petition in intervention is filed in an action involving the appointment of a receiver, questions raised by the petition which have not been disposed of by the trial court will not be considered on review of the order appointing the receiver. *Woods v. Capitol Hill State Bank*, 70 Colo. 221, 199 P. 964 (1921).

Prosecutor's appeal pursuant to § 16-12-102 subject to the final judgment requirement of this rule. *People v. Guatney*, 214 P.3d 1049 (Colo. 2009).

An order declining to revoke probation is not a final judgment within meaning of this

rule, thus the court of appeals lacked jurisdiction to entertain the appeal. *People v. Guatney*, 214 P.3d 1049 (Colo. 2009).

Probation revocation order reviewable. Nothing in § 16-12-101, prohibits a direct appeal of a probation revocation order under this rule. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Appellate review of a county court's decision is available by direct appeal to the Colorado supreme court. *Abts v. Bd. of Educ.*, 622 P.2d 518 (Colo. 1980).

Appeal may not be taken from order denying application to compel arbitration on an employment contract entered into before July 14, 1975. *Monatt v. Pioneer Astro Indus., Inc.*, 42 Colo. App. 265, 592 P.2d 1352 (1979).

Chartering decisions of banking board not within rule. Proceedings in the court of appeals to review chartering decisions of the banking board do not fall within the rules applicable to appeals generally. *Columbine State Bank v. Banking Bd.*, 34 Colo. App. 11, 523 P.2d 474 (1974).

B. Final Judgment.

Appeal may be taken from final judgment only. *Doane v. Glenn*, 1 Colo. 417 (1872); *Hadley v. Fish*, 3 Colo. 51 (1876); *Alvord v. McGaushey*, 5 Colo. 244 (1880); *Wehle v. Kerbs*, 6 Colo. 167 (1882); *Meyer v. Brophy*, 15 Colo. 572, 25 P. 1090 (1890); *Tatarsky v. Smith*, 78 Colo. 491, 242 P. 971 (1926); *Colo. State Bank v. Bird*, 79 Colo. 625, 247 P. 802 (1926); *People ex rel. Ernst v. Eldred*, 86 Colo. 174, 279 P. 41 (1929); *Martin v. Way*, 86 Colo. 232, 280 P. 488 (1929); *Commercial Credit Co. v. Higbee*, 88 Colo. 300, 295 P. 792 (1931); *Marysville & Colo. Land Co. v. Heyde*, 93 Colo. 523, 27 P.2d 498 (1933); *Crews-Beggs Dry Goods Co. v. Bayle*, 96 Colo. 19, 40 P.2d 233 (1934); *Julius Hyman & Co. v. Velsicol Corp.*, 119 Colo. 121, 201 P.2d 380 (1948); *North Sterling Irrigation Dist. v. Knifton*, 132 Colo. 212, 286 P.2d 612 (1955); *People v. Hernandez*, 155 Colo. 519, 395 P.2d 733 (1964) (decided prior to adoption of C.A.R. 4.1 providing for interlocutory appeals in criminal cases).

Entry of final judgment is a prerequisite to the right to prosecute an appeal. *Stonebraker v. Konugres*, 117 Colo. 429, 188 P.2d 894 (1948).

An order entered by a trial court which is a final judgment is subject to review on appeal, and on such appeal an adequate remedy is available. *DeLong v. District Court*, 151 Colo. 364, 377 P.2d 737 (1963).

Other than to orders of the kinds specifically enumerated, an appeal may be taken only from a final judgment, and questions with respect to other interlocutory orders may be presented only on review of the final judgment. *State v. Harrah*, 118 Colo. 468, 196 P.2d 256 (1948);

Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954).

The supreme court cannot determine the propriety of the order of the district court dismissing the action as against the bank where the order or judgment, which the appellant has brought up for review is not a final judgment, but interlocutory, to which an appeal does not lie unless some statute expressly authorizes it. Boxwell v. Greenley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931).

Or from order mentioned in subsections (a)(2), (3), or (4). Save in the exceptional instances mentioned in subsection (a)(2), (3), and (4), an appeal may be taken from a final judgment only. Burks v. Maudlin, 109 Colo. 281, 124 P.2d 601 (1942); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954).

But not interlocutory order. An appeal may not be taken to review an interlocutory order unless expressly authorized by rule or statute. Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

An appeal to review an interlocutory order of a district court may not be taken. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

Appeal dismissed if no final judgment. If it appears on review that there is no final judgment, the appeal will be dismissed. People ex rel. Ernst v. Eldred, 86 Colo. 174, 279 P. 41 (1929); Martin v. Way, 86 Colo. 232, 280 P. 488 (1929); Stuchlik v. Talpers, 90 Colo. 277, 8 P.2d 762 (1932); Marysville & Colo. Land Co. v. Heyde, 93 Colo. 523, 27 P.2d 498 (1933); Morron v. McDaniel, 127 Colo. 180, 254 P.2d 862 (1953); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Schoenwald v. Schoen, 132 Colo. 142, 286 P.2d 341 (1955); Cutting v. DeAndrea, 135 Colo. 501, 313 P.2d 315 (1957); Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959); Ortega v. Bd. of County Comm'rs, 657 P.2d 989 (Colo. App. 1982).

Where record discloses only the sustaining of a motion to dismiss the action without the entry of any order of dismissal, no "matter reviewable" being presented, the appeal will be dismissed. Slifka v. Viettie, 110 Colo. 138, 131 P.2d 417 (1942).

Where there was no final judgment for money against appellants, only an injunction to desist from manufacturing and selling their products, and an accounting was still to be had, an appeal may not be taken and must be dismissed. Julius Hyman & Co. v. Velsicol Corp., 119 Colo. 121, 201 P.2d 380 (1948).

Because case improperly before appellate court. Where the so-called judgment and orders of the court from which an appeal is taken do not constitute a final judgment, a case is therefore improperly before an appellate court on

appeal. People v. People in Interest of G.L.T., 177 Colo. 196, 493 P.2d 20 (1972).

Judicial notice of absence of final judgment. Although the absence of a final judgment was not raised by any of the parties, the court is required to take notice thereof. Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977).

"Final judgment" is one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971); People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977); Moore v. Gardner, 40 Colo. App. 194, 571 P.2d 318 (1977); People in Interest of E.A., 638 P.2d 278 (Colo. 1981); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); People in Interest of P.L.B., 743 P.2d 980 (Colo. App. 1987); Foothills Meadow v. Myers, 832 P.2d 1097 (Colo. App. 1992); Things Remembered v. Fireman's Ins. Co., 924 P.2d 1089 (Colo. App. 1996).

The supreme court has consistently defined a final judgment as one which concludes a case to the extent that no further action is required in order to completely determine the rights of the parties involved. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Until a final judgment has been rendered and entered, no substantial rights of the parties have been determined or effected. North Sterling Irrigation Dist. v. Knifton, 132 Colo. 212, 286 P.2d 612 (1955).

Otherwise, it is interlocutory. If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final, for, to be final, it must end the particular suit in which it is entered. Dusing v. Nelson, 7 Colo. 184, 2 P. 922 (1883); Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910); District Court v. Eagle Rock Gold Mining & Reduction Co., 50 Colo. 365, 115 P. 706 (1911); Goodknight v. Harper, 70 Colo. 41, 197 P. 237 (1921); Peters v. Peters, 82 Colo. 503, 261 P. 874 (1927); Boxwell v. Greeley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931); Julius Hyman & Co. v. Velsicol Corp., 119 Colo. 121, 201 P.2d 380 (1948); Morron v. McDaniel, 127 Colo. 180, 254 P.2d 862 (1953); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956); Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959); Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Andrews v. Hayward, 149 Colo. 585, 369 P.2d 980 (1962); Stillings v. Davis, 158 Colo. 308, 406 P.2d 337 (1965).

Final judgment must terminate the litigation between the parties. *Boxwell v. Greeley Union Nat'l Bank*, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931); *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955); *Jones v. Balbasini*, 134 Colo. 64, 299 P.2d 503 (1956).

A judgment or decree is not final which determines the action as to less than all of the defendants. *Berry v. Westknit Originals, Inc.*, 145 Colo. 48, 357 P.2d 652 (1960).

Until such time as the issue raised by the plea of not guilty by reason of insanity be resolved, there can be no final judgment from which an appeal could be taken, as the litigation has not yet been terminated on its merits. *Rupert v. People*, 156 Colo. 277, 398 P.2d 434 (1965).

Final judgment must leave nothing to be done except ministerial act of execution. *Boxwell v. Greeley Union Nat'l Bank*, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931).

Where there was no order dismissing or otherwise disposing of the claim against the appellee nor was there any order entered in accordance with C.R.C.P. 54(b), there was no final judgment to support an appeal. *Hait v. Miller*, 38 Colo. App. 503, 559 P.2d 260 (1977).

Certification of order does not constitute final adjudication. If an order does not constitute final adjudication of a claim, certification of it as such does not operate to make it so. *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), *aff'd*, 189 Colo. 64, 536 P.2d 1134 (1975).

No particular form of words necessary. A judgment must adjudicate the issues and be complete in itself. Apart from statute, no particular form of words is necessary to constitute a judgment. *Jones v. Galbasini*, 134 Colo. 64, 299 P.2d 503 (1956).

The court should regard the substance and effect of an order, rather than its form, to determine whether it is subject to review. *Cent. Locomotive & Car Works v. Smith*, 27 Colo. App. 449, 150 P. 241 (1915).

The character of an instrument, whether a judgment or an order, is to be determined by its contents and substance, and not by its title. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955).

Counsel, by the simple step of relabeling the procedure by which review is sought, generally may not make a judicial order that is interlocutory in nature reviewable before a final judgment is entered in a case. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

In dissolution proceeding, where trial court incorporated partial separation agreement as well as oral supplemental agreement into the decree of dissolution, there was a final, appealable order notwithstanding the fact that wife's counsel failed to prepare and file a written form of the supplemental agreement. The

decree was dated and signed by the trial court and, by expressly incorporating both the partial separation agreement and the supplemental agreement, it left nothing further for the court to do in order to completely determine the rights of the parties. *In re Sorensen*, 166 P.3d 254 (Colo. App. 2007).

Relief granted may be equitable or legal. A final determination of a cause is a judgment whether the relief granted is equitable or legal. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955).

Multiple claims or parties. Final adjudication of a particular claim in a case involving multiple claims or multiple parties may be certified as a final judgment. *Levine v. Empire Sav. & Loan Ass'n*, 34 Colo. App. 235, 527 P.2d 910 (1974), *aff'd*, 189 Colo. 64, 536 P.2d 1134 (1975).

In a multi-count information, dismissal of some charges is a final order appealable under this rule. *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).

Decision to remand is final judgment where based on denial of procedural due process. The trial court's decision to remand is a final judgment where the remand is premised solely on the conclusion that the party seeking review has been denied procedural due process. *Scott v. City of Englewood*, 672 P.2d 225 (Colo. App. 1983).

District court's dismissal without prejudice was not final and appealable order. Court's dismissal, without prejudice, of plaintiff's claims under 42 U.S.C. §§ 1983 and 1988 on the basis that claims were not properly joined with claim for judicial review under § 42-2-122, was not a final and appealable order, and dismissal of appeal was therefore proper. *Norby v. Charnes*, 764 P.2d 407 (Colo. App. 1988).

The denial of a motion for judgment on the pleadings is not a final judgment subject to review on appeal. It is an interlocutory order. *Central Locomotive & Car Works v. Smith*, 27 Colo. App. 449, 150 P. 241 (1915); *North Sterling Irrigation Dist. v. Knifton*, 132 Colo. 212, 286 P.2d 612 (1955).

When denial of summary judgment is not appealable. Denial of a motion for summary judgment is not an appealable order when it does not otherwise put an end to the litigation. *Glennon Heights, Inc. v. Cent. Bank & Trust*, 658 P.2d 872 (Colo. 1983).

Pretrial ruling that statute is unconstitutional does not constitute a "final judgment" for purposes of appeal. *People v. Young*, 814 P.2d 834 (Colo. 1991).

A default is not a final judgment. *Moore v. Gardner*, 40 Colo. App. 194, 571 P.2d 318 (1977).

Neither is an order quashing service of summons. An order quashing service of sum-

mons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court. *Brockway v. W. & T. Smith Co.*, 17 Colo. App. 96, 66 P. 1073 (1902).

Nor order striking bench warrants. An order of the trial court striking all bench warrants issued in aid of an execution and discharging defendant from custody is not a final judgment from which an appeal may be taken. *Latimer Constr. Co. v. Cram*, 152 Colo. 533, 383 P.2d 315 (1963).

Nor an order for costs. An order of the district court requiring defendants to pay for the additions to the record requested by them was not such a final judgment as would form basis for an allegation of error. *Hays v. City & County of Denver*, 127 Colo. 154, 254 P.2d 860 (1953).

An order of a trial court rendering judgment for costs alone, but not adjudicating the case proper is not such a final judgment as would be subject to review on appeal. *Free v. Chandler*, 155 Colo. 128, 393 P.2d 9 (1964).

Nor an order for sales under powers. Proceedings under C.R.C.P. 120, providing for orders for sales under powers are not an adversary proceeding in which the court determines issues and enters a final judgment, and no appeal may be taken to review the same. *Hastings v. Sec. Thrift & Mtg. Co.*, 145 Colo. 36, 357 P.2d 919 (1960).

Nor an order on motion to vacate a judgment. An order overruling a motion to vacate a judgment is not final in the sense that it may be reviewed on appeal. *Polk v. Butterfield*, 9 Colo. 325, 12 P. 216 (1886); *Hughes v. Felton*, 11 Colo. 489, 19 P. 444 (1888); *Miller v. Buyer*, 77 Colo. 329, 236 P. 990 (1925); *Van Dyke v. Fishman*, 77 Colo. 333, 236 P. 990 (1925).

An order of a trial court in setting aside its former judgment is not a final judgment; therefore, an appeal is premature. *Schtul v. Christ*, 132 Colo. 293, 287 P.2d 661 (1955).

An appeal may not be taken from an order of the trial court vacating a judgment since that order is not a final judgment within the scope and meaning of this rule. *Westerkamp v. Westerkamp*, 155 Colo. 534, 395 P.2d 737 (1964).

Order setting aside default. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by appeal after final judgment. *Gen. Aluminum Corp. v. Arapahoe County Dist. Court*, 165 Colo. 445, 439 P.2d 340 (1968).

Additur to verdict. An order of the trial court granting additur to verdict of jury, or, if either party elected not to accept such additur, granting a new trial is not a final judgment from which an appeal may be taken until, following an election to stand upon the record, the action

proceeds to judgment. *Herzog v. Murad*, 147 Colo. 345, 363 P.2d 645 (1961).

Orders for intervention. The nature of orders for intervention is interlocutory. An order granting intervention does no more than add a new party plaintiff. Such an order is not final, and no appeal from it lies until after entry of final judgment in an action. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

Denial of motion to join third parties. An order denying defendant's motion to make another a third-party plaintiff, being interlocutory and not a final judgment, could be presented only on review of the final judgment as an appeal cannot be taken to review such order. *Burks v. Maudlin*, 109 Colo. 281, 124 P.2d 601 (1942).

Denial of a motion to make a party or parties third-party defendants is not a final judgment subject to review on appeal. *Weaver v. Bankers Life & Cas. Co.*, 146 Colo. 157, 360 P.2d 807 (1961).

Order for temporary possession. In an eminent domain proceeding an appeal may not be taken to review an interlocutory order granting immediate temporary possession. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Remand of license application without affirmance or reversal. Where a trial court remands a license application case without affirming or reversing, but with instructions for further proceedings, the order is not final and appealable. *Safeway Stores, Inc. v. City of Trinidad*, 31 Colo. App. 75, 497 P.2d 1277 (1972).

Appeal while motion for new trial is pending is premature. Plaintiff's appeal is premature, inasmuch as the trial court has not yet entered any final judgment resolving once and for all the controversy at the trial court level, because plaintiff's motion for new trial is still pending. *Commercial Credit Corp. v. Frederick*, 164 Colo. 5, 431 P.2d 1016 (1967).

Order granting or denying a motion for a new trial is not appealable. *Gonzales v. Trujillo*, 133 Colo. 64, 291 P.2d 1063 (1956).

Where a motion for new trial is granted the issues stand undisposed of; hence an appeal taken from the granting of such motion will be dismissed. *Gonzales v. Trujillo*, 133 Colo. 64, 291 P.2d 1063 (1956); *Andrews v. Hayward*, 149 Colo. 585, 369 P.2d 980 (1962).

Where a court has ordered that the defendant be tried again on the same charge, such a ruling is not appealable, for the judgment is not final. *People v. Cochran*, 176 Colo. 364, 490 P.2d 684 (1971).

The granting of "a motion for new trial" is not a motion from which the state can appeal an adverse ruling, for an order granting a motion for new trial does not constitute a final judgment.

ment. *People v. Cochran*, 176 Colo. 364, 490 P.2d 684 (1971).

Child custody order reviewable. An order determining custody of children, like an order determining alimony, is reviewable in the supreme court. *Miller v. Miller*, 129 Colo. 462, 271 P.2d 411 (1954); *People in Interest of K.L. and A.L.*, 681 P.2d 535 (Colo. App. 1984).

Even though child custody order states that it is "temporary", the order is permanent and appealable if it is a permanent adjudication of custody. In *re* *Murphy*, 834 P.2d 1287 (Colo. App. 1992).

Delinquency proceedings subject to finality requirements. Delinquency proceedings are no less subject to the finality requirements of subsection (a)(1) of this rule than any other type of proceeding. *People in Interest of D.H.*, 37 Colo. App. 544, 552 P.2d 29 (1976), *aff'd*, 192 Colo. 542, 561 P.2d 5 (1977).

Dependency and neglect proceedings are subject to the finality requirements of subsection (a)(1). *People in Interest of P.L.B.*, 743 P.2d 980 (Colo. App. 1987); *People in Interest of C.L.S.*, 934 P.2d 851 (Colo. App. 1996).

Following an adjudication of dependency and neglect, the initial disposition order adopting a treatment plan constitutes a "decree of disposition" and renders the adjudication and the initial dispositional order final for purposes of appeal. *People in Interest of C.L.S.*, 934 P.2d 851 (Colo. App. 1996).

Modification of an order for out-of-home placement of a child is interlocutory and not appealable as such modification does not affect the legal custody of the child. *People in Interest of P.L.B.*, 743 P.2d 980 (Colo. App. 1987).

Permanency order in juvenile proceedings held interlocutory in nature. *People in Interest of H.R.*, 883 P.2d 619 (Colo. App. 1994).

Adjudication of a child as dependent or neglected, with the dispositional hearing continued to a future date, does not become a final judgment until a decree of disposition is entered. *People in Interest of E.A.*, 638 P.2d 278 (Colo. 1981).

Order of juvenile division of district court waiving jurisdiction. It is evident from the provisions of §§ 19-3-108 (4), 19-3-106, and 19-3-109, that an order of the juvenile division of the district court waiving jurisdiction is not a final disposition of the action. *People in Interest of D.H.*, 37 Colo. App. 544, 552 P.2d 29 (1976), *aff'd*, 192 Colo. 542, 561 P.2d 5 (1977).

Whether a probate court order is final and appealable must be determined on a case-by-case basis. The test for finality is whether the order disposes of and is conclusive of the controverted claim for which the proceeding was brought. *Estate of Binford v. Gibson*, 839 P.2d 508 (Colo. App. 1992).

An order which completely determines the issues of the trustee's indebtedness to and

compensation from the estate is a final judgment on those issues. Retainer of jurisdiction by the probate court to later modify the trustee's rate of compensation does not change the order into an interlocutory order. *Estate of Binford v. Gibson*, 839 P.2d 508 (Colo. App. 1992).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In *re* *Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

C.R.C.P. 54(b) governs the interlocutory appeal of a probate court order. In *re* *Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

Where probate court's order of partial summary judgment adjudicated fewer than all of the parties' claims, it was not a final judgment, and party could not appeal the order without C.R.C.P. 54(b) certification. In *re* *Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

Order granting a stay in action pending resolution of case involving similar issues in another state was not a final appealable order where the issues and parties were not identical in the two proceedings and the order did not preclude plaintiff from seeking to lift the stay based upon a showing of prejudice. *Things Remembered v. Fireman's Ins. Co.*, 924 P.2d 1089 (Colo. App. 1996).

Granting a motion to dismiss a complaint is not in and of itself a final and reviewable order of judgment from which an appeal may be taken. *District 50 Metro. Rec. Dist. v. Burnside*, 157 Colo. 183, 401 P.2d 833 (1965).

But entry of judgment on dismissal is final. A written ruling by a trial court ordering a complaint to be dismissed and the entry of judgment of dismissal by the clerk pursuant thereto, constitutes a final judgment. *Jones v. Galbasini*, 134 Colo. 64, 299 P.2d 503 (1956).

An order of a trial court dismissing an action for failure to prosecute is a final judgment. *Johnson v. Johnson*, 132 Colo. 236, 287 P.2d 49 (1955).

An appeal could be taken from a judgment of dismissal entered on the motion of the district attorney. *People v. Hernandez*, 155 Colo. 519, 395 P.2d 733 (1964).

A plaintiff who voluntarily accepted an award through stipulation is estopped by his conduct from claiming any further right to relief by appeal. *Farmers Elevator Co. v. First Nat'l Bank*, 30 Colo. App. 529, 497 P.2d 352 (1972), *aff'd*, 181 Colo. 231, 508 P.2d 1261 (1973).

Where parties stipulate that judgment be satisfied, and the stipulation is approved by the court, an appeal becomes moot. *Farmers Eleva-*

tor Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972), *aff'd*, 181 Colo. 231, 508 P.2d 1261 (1973).

Unless there is no inconsistency between enforcement and appeal. A party who accepts an award or legal advantage under any order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted, unless the decree is such or the circumstances such that there is no inconsistency between such enforcement and the appeal. *Farmers Elevator Co. v. First Nat'l Bank*, 30 Colo. App. 529, 497 P.2d 352 (1972), *aff'd*, 181 Colo. 231, 508 P.2d 1261 (1973).

Dismissal of class action aspects of case held to constitute final judgment. *Levine v. Empire Sav. & Loan Ass'n*, 192 Colo. 188, 557 P.2d 386 (1976).

Judgment of district court on appeal from assessment reviewable. Under subsection (a)(1) of this rule, the supreme court may review the judgment of the district court rendered in a statutory proceeding relating to appeals from assessments made by the county assessor. *In re Hover Motors, Inc.*, 120 Colo. 511, 212 P.2d 99 (1949).

Revocation of deferred sentence appealable. A defendant may either appeal an order revoking a deferred sentence pursuant to this rule, or file a motion for postconviction review, pursuant to Crim. P. 35(c). *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

A postjudgment collection order is final if the order ends the particular part of the action in which it is entered, leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that part of the proceeding, and is more than a ministerial or administrative determination. *Luster v. Brinkman*, 250 P.3d 664 (Colo. App. 2010).

State cannot appeal delinquency case. An appeal on behalf of the state to review decisions of trial courts on questions of law arising in criminal cases cannot lie for a proceeding in delinquency case, for such is not a criminal case. *People in Interest of P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971).

Rather, the state's right to appeal exists only where the trial court's decision terminates a prosecution. *People v. Cochran*, 176 Colo. 364, 490 P.2d 684 (1971).

When final judgment entered. For purposes of appeal, the final judgment was entered when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal taken more than 30 days after sentencing was proper. *People v. Fisher*, 539 P.2d 1253 (1975).

Since the trial court reserved ruling on defendant's request to withdraw his guilty plea, there is no final appealable order, so

appellate review is not available. *People v. Durapau*, __ P.3d __ (Colo. App. 2011).

C. Review of Water Matters.

The supreme court has jurisdiction to review a general adjudication decree settling the priorities of the reservoirs upon a particular stream, and this necessarily involves the power to determine whether a reservoir to which a priority has been awarded is entitled to any priority whatsoever. *Greeley & Loveland Irrigation Co. v. Huppe*, 60 Colo. 535, 155 P. 386 (1916).

And may make and direct the entry of a proper amended decree. On appeal to review an adjudication decree, when any part of the decree is reversed, and where practicable, the supreme court shall make and direct the entry of a proper amended decree. *Greeley & Loveland Irrigation Co. v. Handy Ditch Co.*, 77 Colo. 487, 240 P. 270 (1925).

The supreme court has jurisdiction over an appeal from a water court judgment that is a full, final, and complete determination of claims presented. The only claim at issue was a city's application for a refill right, and the mere presence of a signature line for the federal court, per the parties' stipulation, did not affect the validity of the water court's decree nor did it transfer authority to the federal court. *City of Grand Junction v. Denver*, 960 P.2d 675 (Colo. 1998).

All water users are proper parties. Where a proceeding is conducted pursuant to statutory direction, all users of water affected by said proceeding are, in effect, parties and have full right to protect their rights had they so desired. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

But appellants must be aggrieved by judgment to prosecute appeal. Where the only parties designated as appellees and served with notice of appeal for supreme court review were the plaintiffs in the trial court whose claims therein were dismissed and judgment entered therein in favor of the appellants, the appellants being in no wise aggrieved by the judgment, the appeal will be dismissed. *Camenisch v. Nuccitelli*, 150 Colo. 141, 372 P.2d 85 (1962).

Incomplete judgment on claims reversed. Where a statutory water adjudication proceeding is brought up for review, and it appears that there was an incomplete determination of some of the claims before the trial court, the judgment is reversed on that ground only, the supreme court declining to pass upon the case piecemeal. *Northern Colo. Irrigation Co. v. City & County of Denver*, 86 Colo. 54, 278 P. 592 (1929).

In a proceeding to adjudicate priority of rights to the use of water, a general water adjudication was held not final, where it failed to

determine all claims presented. *Northern Colo. Irrigation Co. v. City & County of Denver*, 86 Colo. 54, 278 P. 592 (1929).

III. GROUNDS FOR REVERSAL.

No judicial obligation is more imperative than the accomplishment of justice in any particular case where the trial record does not reflect as an absolute that every evidentiary requirement for sustaining a guilty verdict was fulfilled. *People v. Emeson*, 179 Colo. 308, 500 P.2d 368 (1972).

Specification of points no longer required. The rules of civil procedure, apparently having been confusing to the bar as to the distinction between the "specification of points" and the "statement of each point intended to be urged" formerly required, were amended to eliminate specification of points. *Mauldin v. Lowery*, 127 Colo. 234, 255 P.2d 976 (1953); *Allison v. Heller*, 132 Colo. 415, 289 P.2d 160 (1955).

Incorrect instruction may be error. Where the instruction affects substantial rights of the plaintiffs, the supreme court may elect to address the correctness of the instruction in order to prevent injustice. *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Colo. 1984).

General statement of error insufficient. A statement of grounds for reversal so general that it covers any possible question involved in the record is not sufficient to authorize its consideration on review. *Allison v. Heller*, 132 Colo. 415, 289 P.2d 160 (1955).

A general specification of points is insufficient and will not be considered upon review. *Farrell v. Bashor*, 140 Colo. 408, 344 P.2d 692 (1959).

An assertion that the findings and orders of a trial court are contrary to the evidence and contrary to the law is not sufficient to authorize its consideration upon review. *Allison v. Heller*, 132 Colo. 415, 289 P.2d 160 (1955); *Phipps v. Hurd*, 133 Colo. 547, 297 P.2d 1048 (1956).

Generally stating that evidence was insufficient to support trial court's determinations, and failing to make specific arguments, identify supporting facts, or set forth specific authorities to support contention of error was insufficient to authorize consideration upon review. *People ex rel. D.B.-J.*, 89 P.3d 530 (Colo. App. 2004).

Court may decline to notice errors where statement is deficient. Where a proper statement of grounds for reversal is lacking, or where it fails to direct attention to the alleged error, the supreme court may decline to notice alleged errors presented in the argument. *Allison v. Heller*, 132 Colo. 415, 289 P.2d 160 (1955).

Brief must direct attention of court to alleged error. A statement of grounds required under section (d) of this rule that fails to direct attention to any alleged error is meaningless

and does not comply with this rule. *Allison v. Heller*, 132 Colo. 415, 289 P.2d 160 (1955).

Even though matter alleged to be error is mentioned in the defendant's motion for new trial, it was not mentioned in his brief to the supreme court, and therefore, it was waived. *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973).

Contemporaneous objection required. An appellate court need not review errors where counsel fails to make a contemporaneous objection. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972); *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972); *People v. Routa*, 180 Colo. 386, 505 P.2d 1298 (1973).

Where defendant fails to object during trial to statements made by prosecutor, he waives further objection as matter of right on appeal. *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972).

Absent defect affecting substantial right. The failure to timely object will preclude an appellate from reversing on the ground that there is an absence of a showing of defects affecting the substantial rights. *Crespin v. People*, 175 Colo. 509, 488 P.2d 877 (1971).

Lack of contemporaneous objection at trial constitutes waiver of objections to admission of evidence, and issues may not be raised on appeal; if they are, they will not be considered unless errors are so fundamental as to seriously prejudice basic rights of defendant. *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972).

Or where contemporaneous objection impossible. Where purported impropriety of comments in prosecutor's opening statement cannot be alleged until prosecutor fails to support statements during presentation of case, and strict contemporaneous objection by defense counsel following opening statement is therefore impossible, the failure to object immediately to prosecutor's statements does not constitute waiver of right to object as matter of right on appeal. *People v. Jacobs*, 179 Colo. 182, 499 P.2d 615 (1972).

This rule modifies C.R.C.P. 51. C.R.C.P. 51, providing that only grounds specified in objections to instructions will be considered on appeal is modified by this rule permitting the supreme court at its discretion to notice any error of record, and such discretion will be exercised when necessary to do justice. *Warner v. Barnard*, 134 Colo. 337, 304 P.2d 898 (1956).

Court may notice error of record on its own motion. Although counsel are confined to the points properly specified, the supreme court, under special circumstances, frequently notices error appearing of record and takes appropriate action to protect the right of a litigant to have his cause determined under well-established principles of law. *Warner v. Barnard*, 134 Colo. 337, 304 P.2d 898 (1956); *Mt. Emmons Mining*

Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984); People v. Herrera, 734 P.2d 136 (Colo. App. 1986).

The discretionary power of the supreme court to notice any error appearing of record is granted by this rule even where the plaintiff in the lower court failed to make appropriate objections and exceptions thereto. Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

Under the provisions of this rule the supreme court may notice error appearing on the face of the record when in the interest of justice to a litigant it is appropriate to do so. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

The right and duty of an appellate court to notice error on appeal and to reverse under section (d) of this rule has generally been applied to those situations where the error could be characterized as "fundamental" or where it is the cause of a "miscarriage of justice". Polster v. Griff's of Am., Inc., 184 Colo. 418, 520 P.2d 745 (1974).

Such as error in amount of verdict. An error in the amount of a verdict not properly before the supreme court, as for excessive damages, is one which is of enough importance to consider on the supreme court's own motion

when such a course is considered necessary to do complete justice. Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

Where counsel failed to tender suitable instructions on the measure of damages in a personal injury action, it was the duty of the court to so instruct on its own motion. In such circumstances, the supreme court exercised its discretion in noticing error appearing on the face of the record even though not raised by the parties. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

Error noticed on record was not prejudicial. Clark v. Bunnell, 172 Colo. 32, 470 P.2d 42 (1970).

Ground waived in motion for new trial unavailable on appeal. In an action to foreclose a deed of trust, where defendants' motion for a new trial waived the defense of tender before the trial court, it cannot be reasserted in the supreme court on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

When defendant claims that evidence is insufficient to convict, an appellate court should view evidence in light most favorable to prosecution. People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, the appellate court may, except as otherwise provided in C.A.R. 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

ANNOTATION

The supreme court may retain and review an appeal of a declaratory order of the state personnel board that should have been filed with the court of appeals. The court's authority rests in its power under C.A.R. 50(b) to review cases pending in the court of appeals prior to judgment and under this rule to suspend the rules of appellate procedure. Colorado Ass'n of Pub. Emp. v. DOH, 809 P.2d 988 (Colo. 1991).

This rule permits an appellate court to expedite decisions and order proceedings in

accordance with its direction even though C.A.R. 3.4 does not extend to permanent custody orders entered in dependency or neglect proceedings. People ex rel. K.A., 155 P.3d 558 (Colo. App. 2006).

Applied in Rivera v. Civil Serv. Comm'n, 34 Colo. App. 152, 529 P.2d 1347 (1974); Converse v. Zinke, 635 P.2d 1228 (Colo. App. 1979); People v. Williams, 736 P.2d 1229 (Colo. App. 1986).

APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS AND AGENCIES

Rule 3. Appeal as of Right — How Taken

(a) **Filing the Notice of Appeal in Appeals from Trial Courts.** An appeal permitted by law from a trial court to the appellate court shall be taken by filing a notice of appeal with the clerk of the appellate court within the time allowed by C.A.R. 4. Upon the filing of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal and all procedures concerning the appeal unless otherwise specified by these rules. An advisory copy of the notice of appeal shall be served on the clerk of the trial court within

the time for its filing in the appellate court. Failure of an appellant to take any step other than the timely filing of a notice of appeal in the appellate court does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal shall not be deemed jurisdictional.

Comment: This change requires the direct filing of the notice of appeal with the appellate court.

(b) Filing the Notice of Appeal or Petition for Review in Appeals from State Agencies. An appeal permitted by statute from a state agency directly to the Court of Appeals or appellate review from a district court shall be in the manner and within the time prescribed by the particular statute.

(c) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(d) Contents of the Notice of Appeal in Civil Cases (Other Than District Court Review of Agency Actions and Appeals From State Agencies). The notice of appeal shall set forth:

- (1) A caption that complies in form with C.A.R. 32. In the caption:
 - (A) The case title in compliance with C.A.R. 12(a);
 - (B) The trial court from which the appeal is taken;
 - (C) The trial court judge;
 - (D) The party or parties initiating the appeal; and
 - (E) The trial court case number.
- (2) A brief description of the nature of the case including:
 - (A) A general statement of the nature of the controversy (not to exceed one page);
 - (B) The judgment, order or parts being appealed and a statement indicating the basis for the appellate court's jurisdiction;
 - (C) Whether the judgment or order resolved all issues pending before the trial court including attorneys' fees and costs;
 - (D) Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b);
 - (E) The date the judgment or order was entered (if there is a question of the date, set forth the details) and the date of mailing to counsel;
 - (F) Whether there were any extensions granted to file any motion(s) for post-trial relief. If so, the date of the request, whether the request was granted and date to which filing was extended;
 - (G) The date any motion for post-trial relief was filed;
 - (H) The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j); and
 - (I) Whether there were any extensions granted to file any notice(s) of appeal. If so, the date of the request, whether the request was granted and the date to which filing was extended.
- (3) An advisory listing of the issues to be raised on appeal;
- (4) Whether the transcript of any evidence taken before the trial court or any administrative agency is necessary to resolved the issues raised on appeal, the name of the court reporter, and the approximate length of any transcript of testimony anticipated to be filed in this action;
- (5) As to filing in the Court of Appeals only, state whether or not a preargument conference is requested;
- (6) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;
- (7) An appendix containing a copy of the judgment or order being appealed, the findings of the court, if any, the motion for new trial, if any, and a copy of the trial court's

order granting or denying leave to proceed in forma pauperis if appellant is filing without docket fee pursuant to C.A.R. 12(b); and

(8) A certificate of service, in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the trial court and all other parties to the action in the trial court.

Comment: This rule combines the notice of appeal, designation of parties, and preliminary statements into one document which requires certain jurisdictional information in lieu of a copy of the trial court's register of actions. It also requires the attachment of the order being appealed to the notice of appeal. The reason for requesting the length of the transcript is for the purposes of making determinations, at a later time, as to time limitations to be placed upon court reporters and for the severity of sanctions, if necessary. In 1984 this change rearranges items (5) through (8) in the list of contents of the notice of appeal in civil cases.

(e) Contents of Notice of Appeal from State Agencies (Other Than the Industrial Claim Appeals Office) Directly to the Court of Appeals. The Notice of Appeal Shall Set Forth:

- (1) A caption that complies in form with C.A.R. 32. In the caption:
 - (A) The case title in compliance with C.A.R. 12(a);
 - (B) The agency from which the appeal is taken;
 - (C) The party or parties initiating the appeal; and
 - (D) The agency case number.
- (2) A brief description of the nature of the case including:
 - (A) A general statement of the nature of the controversy (not to exceed one page);
 - (B) The order being appealed and a statement indicating the basis for the appellate court's jurisdiction;
 - (C) Whether the order resolved all issues pending before the agency;
 - (D) Whether the order is final for purposes of appeal; and
 - (E) The date of service of the final order entered in the action by the agency. The date of service of an order is the date on which a copy of the order is delivered in person, or, if service is by mail, the date of mailing.
- (3) An advisory listing of the issues to be raised on appeal;
- (4) Whether the transcript of any evidence taken before the administrative agency is necessary to resolve the issues raised on appeal, and the approximate length of any transcript of testimony anticipated to be filed in this action;
- (5) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;
- (6) An appendix containing a copy of the order being appealed and the findings of the agency, if any; and
- (7) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the state agency and all other persons who have appeared as parties to the action before the agency, or as required by 24-4-106 (4), C.R.S. concerning rule-making appeals.

(f) Contents of Notice of Appeal from District Court Review of Agency Actions. The notice of appeal shall set forth:

- (1) A caption that complies in form with C.A.R. 32. In the caption:
 - (A) The case title in compliance with C.A.R. 12(a);
 - (B) The district court from which this appeal is taken;
 - (C) The district court judge;
 - (D) The agency from which the judicial review was sought;
 - (E) The party or parties initiating the appeal;
 - (F) The district court case number; and
 - (G) The agency case number.
- (2) A brief description of the nature of the case including:
 - (A) A general statement of the nature of the controversy (not to exceed one page);
 - (B) The decision or order being appealed and a statement indicating the basis for the appellate court's jurisdiction;
 - (C) Whether the decision or order resolved all issues pending before the agency;

- (D) Whether the decision or order is final for purposes of appeal;
 - (E) The date the decision or order was entered (if there is a question of the date, set forth the details) and the date of mailing to counsel;
 - (F) Whether there were any extensions granted to file any motion(s) for post-trial relief. If so, the date of the request, whether the request was granted and the date to which filing was extended;
 - (G) The date any motion for post-trial relief was filed;
 - (H) The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j);
 - (I) The date the notice of intent to seek appellate review was filed with the district court (C.R.S. 24-4-106 (9)); and
 - (J) Whether there were any extensions granted to file any notice(s) of appeal. If so, the date of the request, whether the request was granted and the date to which filing was extended.
- (3) An advisory listing of the issues to be raised on appeal;
- (4) Whether the transcript of any evidence taken before the administrative agency is necessary to resolve the issues raised on appeal, and the approximate length of any transcript of testimony anticipated to be filed in this action;
- (5) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;
- (6) An appendix containing a copy of the decision or order being appealed, the agency order and the findings of the agency, if any; and
- (7) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the reviewing court, the agency and all other persons who have appeared as parties to the district court proceedings.
- (g) Contents of the Notice of Appeal in Criminal Cases.** The Notice of Appeal Shall Set Forth:
- (1) A caption that complies in form with C.A.R. 32. In the caption:
 - (A) The case title in compliance with C.A.R. 12(a);
 - (B) The district court from which the appeal is taken;
 - (C) The party or parties initiating the appeal;
 - (D) The trial court case number; and
 - (E) The trial court judge.
 - (2) A brief description of the nature of the case including:
 - (A) A general statement of the nature of the case;
 - (B) The charges upon which defendant was tried;
 - (C) The charges for which defendant was convicted;
 - (D) The date judgment of conviction was entered;
 - (E) The date the sentence was imposed;
 - (F) The sentence; and
 - (G) A statement indicating the basis for the appellate court's jurisdiction.
 - (3) Whether an appeal bond was granted and, if so, the amount of the bond;
 - (4) An advisory listing of the issues to be raised on appeal;
 - (5) Whether any transcript of evidence taken at trial is necessary to resolve the issues on appeal, whether such transcript will exceed twenty-five pages in length, and the name of the court reporter;
 - (6) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;
 - (7) An appendix containing a copy of the judgment or order being appealed, the mittimus, the findings of the court, if any, the motion for new trial, if any, and a copy of the trial court's order granting or denying leave to proceed in forma pauperis if appellant is filing without docket fee pursuant to C.A.R. 12(b); and
 - (8) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the trial court and all other parties to the action in the trial court.

Comment: Combines the notice of appeal, designation of parties, and preliminary statement into one document. Requests certain jurisdictional information. Also, requires the attachment of a copy of the order being appealed to the notice of appeal. This rule also requires a notice of appeal in criminal cases should include information about counsel for the parties as is now required in the notices for all other types of appeal.

(h) Contents of any Notice of Cross-Appeal. A notice of cross-appeal shall set forth the same information required for a notice of appeal and shall set forth the party initiating the cross-appeal and designate all cross-appellees.

(i) Number of Copies to be Filed. Five copies of the notice of appeal or cross-appeal shall be filed with the original.

Source: IP(d) added and (d)(1), (d)(2), IP(f), (f)(1), and (f)(2) amended August 23, 1984, effective January 1, 1985; (d)(2)(B), (e)(2)(B), (f)(2)(B), (g)(2)(E), and (g)(2)(F) amended and (g)(2)(G) and (i) added August 30, 1985, effective January 1, 1986; (d)(7) and (g)(7) amended May 15, 1986, effective November 1, 1986; and IP(e) and (e)(7) amended June 4, 1987, effective January 1, 1988; (h) amended March 17, 1994, effective July 1, 1994; (h) amended June 7, 1994, effective July 1, 1994; IP(d)(1), IP(e)(1), IP(f)(1), and IP(g)(1) amended June 1, 2000, effective July 1, 2000.

Cross references: For time within which notice of appeal must be filed, see C.A.R. 4.

ANNOTATION

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953).

Purpose of the notice of appeal is simply to put the other party on notice that an appeal will be taken and to identify the action of the trial court from which the appeal is to be taken. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980).

The particular function of the notice of appeal is to require the clerk of the court, in which the judgment complained of is entered, to certify the record for review. *Hull v. Denver Tramway Corp.*, 97 Colo. 523, 50 P.2d 791 (1935); *Wheeler Kelly Hagny Trust Co. v. Williamson*, 111 Colo. 515, 143 P.2d 685 (1943); *People v. Bost*, 770 P.2d 1209 (Colo. 1989).

Purpose of requiring notice where less than the entire record is designated on appeal is to permit the appellee an opportunity to add to the designated portions. *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975).

Timely filing of notice of appeal is mandatory and jurisdictional. *Chapman v. Miller*, 29 Colo. App. 8, 476 P.2d 763 (1970); *Cline v. Farmers Ins. Exchange*, 792 P.2d 305 (Colo. App. 1990).

Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980).

The filing of a notice of appeal is mandatory and a jurisdictional prerequisite for appellate review of a lower court decision to deny a Rule 35(a), Crim. P. motion. *People v. Silvola*, 198 Colo. 228, 597 P.2d 583 (1979).

Notice of appeal not timely filed. Earlier notice of appeal, which related to probate of will, did not provide notice of appeal of order vacating notices of lis pendens to estate property, and since no timely appeal was filed, court lacked jurisdiction over appeal. *Matter of Estate of Anderson*, 727 P.2d 867 (Colo. App. 1986)(decided under former rule).

Untimely service of notice of appeal to appellee does not affect court's jurisdiction to hear appeal. *B.A. Leasing Corp. v. State Bd. of Equal.*, 745 P.2d 254 (Colo. App. 1987), *aff'd* sub nom. *Gates Rubber Co. v. Bd. of Equalization*, 770 P.2d 1189 (Colo. 1989).

Notice of appeal is not "pleading" within strict definition of term, and therefore failure to serve copies of notice as directed by trial court did not warrant court of appeals decision to dismiss appeal. *Matter of Estate of Jones*, 704 P.2d 845 (Colo. 1985) (decided under former rule).

Dismissal of appeal for failure to serve notice of designation of record is made discretionary by section (a). *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975).

Substantial compliance with section (c) is all that is required. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980); See *People v. Bost*, 770 P.2d 1209 (Colo. 1989).

Lack of designation in the caption that the document is a notice of appeal will not defeat substantial compliance. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980).

Where defendant objected to venue by filing a proper motion prior to answering complaint, issue was preserved for appeal regardless of lack of specific reference to venue in notice of

appeal. *Resolution Trust Corp. v. Parker*, 824 P.2d 102 (Colo. App. 1991).

Defect in the notice of appeal was harmless where appellant failed to list all of the parties to the appeal, but complied with all other provisions of the rule. *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306 (Colo. App. 1998).

When sanctions are imposed against a litigant's attorney, the attorney is a real party in interest and must appeal in his or her own name. Because plaintiffs' attorney did not file a separate notice of appeal and the plaintiffs' notice of appeal did not name the attorney as an appellant, the court is jurisdictionally barred from deciding whether the trial court abused its discretion in imposing sanctions against the attorney. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992), implicitly overruled in *Cruz v. Benine*, 984 P.2d 1173 (Colo. 1999).

To have standing to appeal an award of attorney fees only against a party's attorney, the attorney must file a separate appeal or be added as an appellant to the party's appeal. *Anglum v. USAA Cas. Ins. Co.*, 166 P.3d 191 (Colo. App. 2007).

Abuse of discretion. In light of the significance of the issues on appeal (i.e., the state's obligation to maintain state prisoners in state correctional facilities and to reimburse counties for confining state prisoners) and the fact that both petitioner and respondent sought appellate review, the court of appeals abused its discretion in dismissing case for failure to timely transmit the record. *Dept. of Corr. v. Pena*, 788 P.2d 143 (Colo. 1990).

Substantiality of issues. When determining whether dismissal is an appropriate sanction for failure to timely transmit the record, an appellate court should consider the substantiality of the issues on appeal and the full range of possible sanctions and should select the sanction most appropriate under the circumstances. *Dept. of Corr. v. Pena*, 788 P.2d 143 (Colo. 1990).

Court elected to suspend strict requirements of this rule. *Serv. Oil Co. v. Rhodus*, 179 Colo. 335, 500 P.2d 807 (1972); *Converse v. Zinke*, 635 P.2d 1228 (Colo. App. 1979), *aff'd in part, and rev'd on other grounds*, 635 P.2d 882 (Colo. 1981).

Supersedeas not required. The appeal and the supersedeas are two separate things, and the appeal can be sustained without a supersedeas. *Monks v. Hemphill*, 119 Colo. 378, 203 P.2d 503 (1949).

Rule inapplicable to industrial commission orders. This rule has no application to the review of orders of the industrial commission. *Trujillo v. Indus. Comm'n*, 31 Colo. App. 297, 501 P.2d 1344 (1972).

Applied in *Beadles v. Metayka*, 135 Colo. 366, 311 P.2d 711 (1957); *In re Peterson*, 40 Colo. App. 115, 572 P.2d 849 (1977); *Catron v. Catron*, 40 Colo. App. 476, 577 P.2d 322 (1978); *Gillespie v. Dir. of Dept. of Rev.*, 41 Colo. App. 561, 592 P.2d 418 (1978); *Dayhoff v. State, Motor Vehicle Div.*, 42 Colo. App. 91, 595 P.2d 1051 (1979); *People v. Moore*, 674 P.2d 354 (Colo. 1984).

Rule 3.1. Appeals from Industrial Claim Appeals Office

(a) **How Taken.** Appeals from orders and awards of the Industrial Claim Appeals Office shall be in the manner and within the time prescribed by statute. On appeal from orders and awards entered upon review of cases determined by the Industrial Claim Appeals Office, the record of the proceedings shall be arranged in chronological order, with all duplicates omitted. The record shall be properly paginated and fully indexed and bound by the agency.

(b) 14 days after return of the record, the appellant shall file an opening brief. Within 14 days after service of the opening brief, the appellee shall file an answer brief. Within 7 days after service of the answer brief, the appellant may file a reply brief. Briefs may be printed, typewritten, mimeographed, or otherwise reproduced in conformity with the provisions of C.A.R. 28.

(c) **Priority of Industrial Claim Appeals Office Cases.** All appeals from the Industrial Claim Appeals Office shall have precedence over any civil cause of a different nature pending in said court, and the Court of Appeals shall always be deemed open for the determination thereof, and shall be determined by the Court of Appeals in the manner as provided for other appeals.

(d) **Contents of Notice of Appeal from the Industrial Claim Appeals Office Directly to the Court of Appeals.** The notice of appeal shall set forth:

- (1) A caption that complies in form with C.A.R. 32. In the caption:
 - (A) The case title in compliance with C.A.R. 12(a);
 - (B) The party or parties initiating the appeal;
 - (C) All others who have appeared as parties to the action before the agency; and
 - (D) The agency case number.

- (2) A brief description of the nature of the case including:
 - (A) A general statement of the nature of the controversy (not to exceed one page);
 - (B) The order being appealed and a statement indicating the basis for the appellate court's jurisdiction;
 - (C) Whether the order resolved all issues pending before the agency;
 - (D) Whether the order is final for purposes of appeal; and
 - (E) The date of the certificate of mailing of the final order.
- (3) An advisory listing of the issues to be raised on appeal;
- (4) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;
- (5) An appendix containing a copy of the order being appealed and the findings of the agency, if any; and
- (6) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the Industrial Claim Appeals Office panel in workmen's compensation cases, and on the Division of Employment and Training in unemployment insurance cases, and on all other persons who have appeared as parties to the action before the agency.

Source: Entire rule amended June 4, 1987, effective January 1, 1988; IP(d)(1) amended June 1, 2000, effective July 1, 2000; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For statutory provision relating to appellate review of workers' compensation decisions, see part 3 of article 43 of title 8, C.R.S.

ANNOTATION

Procedural requirements mandatory and jurisdictional. The procedural requirements for obtaining administrative or appellate review of the commission's orders are mandatory and jurisdictional. *Hildreth v. Dir. of Div. of Labor*, 30 Colo. App. 415, 497 P.2d 350 (1972).

One seeking to exercise a statutory right of review or appeal must follow and comply with the procedures prescribed, and failure to do so deprives the court of jurisdiction. *Trujillo v. Indus. Comm'n*, 31 Colo. App. 297, 501 P.2d 1344 (1972).

There is no authority for the filing of notice of appeal in proceedings in the appellate court for review of final orders of the industrial commission; therefore, such notice is inoperative for any purpose and, being a nullity, does not extend the time prescribed for commencing the review. *Trujillo v. Indus. Comm'n*, 31 Colo. App. 297, 501 P.2d 1344 (1972).

With respect to the service of process requirement of § 8-53-119 (3), (now § 8-43-307) service upon the attorney general constitutes service upon industrial commission (now industrial claim appeals office). *Butkovich v. Indus. Comm'n*, 723 P.2d 1306 (Colo. 1985).

No damages may be awarded under this section as a sanction for a frivolous review petition. *Haynes v. Interior Investments*, 725 P.2d 100 (Colo. App. 1986).

Notice of appeal sufficient to satisfy requirements of § 8-53-119 (now § 8-43-307) and to invoke the jurisdiction of the Court of Appeals where the document complied with the requirements of this rule and of that section but merely failed to bear the caption "Petition for Review". *Hawkins v. State Comp. Ins. Authority*, 790 P.2d 893 (Colo. App. 1990).

Rule 3.2. Appeals from the Denial of a Petition for Waiver of Parental Notification Requirements

Appeals from orders denying a petition for waiver of the parental notification requirements of Section 12-37.5-104, C.R.S., shall be in the manner and within the time prescribed in Chapter 23.5 of the Colorado Rules of Civil Procedure.

Source: Entire rule added and adopted September 18, 2003; entire rule corrected effective June 16, 2004.

Editor's note: This rule was originally adopted as rule 3.2 of chapter 1, C.R.C.P., on September 18, 2003, but was relocated pursuant to corrective order on June 16, 2004.

Rule 3.3. Appeals of Grant or Denial of Class Certification

An appeal from an order granting or denying class certification under C.R.C.P. 23(f) may be allowed pursuant to the procedures set forth in that rule and C.R.S. § 13-20-901.

Source: Entire rule added and effective September 9, 2004; entire rule amended and effective April 5, 2010.

Rule 3.4. Appeals from Proceedings in Dependency or Neglect

(a) **How Taken.** Appeals from orders in dependency or neglect proceedings, as permitted by section 19-1-109(2)(b) and (c), C.R.S., and including final orders of permanent legal custody entered pursuant to section 19-3-702, C.R.S., shall be in the manner and within the time prescribed by this rule.

(b) **Time for Appeal.** (1) A Notice of Appeal and Designation of Record (Form 1) shall be filed with the clerk of the Court of Appeals and an advisory copy served on the clerk of the trial court within 21 days after the entry of the order from which the appeal is taken. If a motion for post-trial relief is timely filed pursuant to C.R.C.P. 59, the time for filing the notice of appeal begins to run upon the entry of an order denying the motion or upon the date the motion is deemed denied under C.R.C.P. 59(j), whichever occurs first. An order is entered within the meaning of this rule when it is entered pursuant to C.R.C.P. 58. If notice of the entry of the order is mailed to the parties, the time for filing the notice of appeal shall commence from the date of mailing.

(2) If a timely notice of appeal is filed, any other party may file a Notice of Cross-Appeal and Designation of Record (Form 1) within 7 days of the date on which the notice of appeal was filed or within the 21 days for the filing of the notice of appeal, whichever period expires last.

(3) The time in which to file a notice of appeal or a notice of cross-appeal and the corresponding designation of record will not be extended, except upon a showing of good cause pursuant to C.A.R. 2 and C.A.R. 26(b).

(c) **Docketing the Appeal.** The appeal shall be docketed in accordance with C.A.R. 12(a).

(d) **Notice of Appeal.** The Notice of Appeal and Designation of Record (Form 1) must be prepared and signed by the appellant's trial counsel or by the appellant, if pro se. The notice must identify the party or parties initiating the appeal, specify the order or part thereof from which the appeal is taken, and set forth the date the order was reduced to writing, dated, and signed by the trial court. The notice must be signed by the appellant, if an adult, unless counsel states in the notice of appeal that the appellant has specifically authorized the filing of the appeal. If counsel is unable to file a notice of appeal because the appellant is unavailable, counsel may file a Certificate of Diligent Search (Form 2) with the clerk of the trial court.

(e) **Record on Appeal.**

(1) The record on appeal shall include the trial court file, including all exhibits, and any transcripts ordered by the parties pursuant to this rule.

(2) The appellant and the cross-appellant, if any, shall (A) complete a Notice of Appeal (Cross-Appeal) and Designation of Record (Form 1); (B) file Form 1 with the clerk of the trial court and the clerk of the Court of Appeals; and (C) serve Form 1 on any court reporter listed therein.

(3) The designation of record portion of Form 1 shall identify the dates of the proceedings for which transcripts are requested and the names of the court reporters. Service of the Notice of Appeal and Designation of Record (Form 1) and the Supplemental

Designation of Record (Form 3), if any, on the court reporter shall constitute a request for transcription of the specified proceedings.

(4) Within 7 days after service of a designation of record, any appellee may complete and file a Supplemental Designation of Record (Form 3) with the clerk of the trial court and the clerk of the Court of Appeals and serve it on the court reporter listed therein.

(5) Within 7 days after service of the Notice of Appeal and Designation of Record (Form 1), the designating party or public entity responsible for the cost of transcription shall make arrangements for payment with the court reporter. Within 14 days after service of the Notice of Appeal and Designation of Record (Form 1), the court reporter shall file a statement with the clerk of the trial court and the clerk of the Court of Appeals indicating whether arrangements for payment have been made.

(6) After arrangements for payment of the transcript have been made, any party may request a copy of the unedited transcript from the court reporter for use in preparing the petition on appeal or the response to the petition on appeal (cross-appeal). The unedited transcript may be in electronic form and is not an official transcript of the trial court proceedings. The court reporter may require a signed waiver of liability for any errors in the unedited transcript.

(f) Transmission of Record.

(1) Within 42 days after the filing of the Notice of Appeal and Designation of Record (Form 1), the record, including any transcripts or exhibits, shall be transmitted to the Court of Appeals in accordance with C.A.R. 11(b).

(2) The appellant may request an extension of time of no more than 14 days in which to file the record, which will be granted only upon a showing of good cause. If the request is based on the court reporter's inability to complete the transcript, it must be supported by an affidavit of the reporter specifying why the transcript has not been completed.

(g) Petition on Appeal.

(1) Within 21 days after the filing of the Notice of Appeal and Designation of Record (Form 1), the appellant shall file an original and five copies of a Petition on Appeal (Form 4). The petition shall be prepared by appellant if proceeding pro se, by appellant's trial counsel, or by substitute counsel so long as substitute counsel has filed an entry of appearance. Except for extraordinary circumstances, substitution of counsel shall not be grounds for an extension of time.

(2) The appellant may request one extension of time of no more than 7 days in which to file the petition, which will be denied except upon a showing of manifest injustice.

(3) Unless the petition contains no more than 6,300 words, it shall not exceed twenty pages, excluding the attachments required by this Rule 3.4(g)(3)(G). The petition on appeal shall conform to the requirements in C.A.R. 32(a) and shall include:

(A) A cover page containing the information set forth in C.A.R. 32(c);

(B) A statement of the nature of the case and the relief sought;

(C) The date the trial court order was entered;

(D) A concise statement of the material facts as they relate to the issues presented in the petition on appeal (references to page and line numbers in the record are not required);

(E) A concise statement of the legal issues presented for appeal, including a statement of how the issues arose (general conclusory statements such as "the trial court's ruling is not supported by the law or the evidence" are not acceptable);

(F) Supporting statutes, case law, or other legal authority for the issues raised, together with a statement of the legal proposition for which the legal authority stands and a concise explanation of its applicability to the issues presented on appeal; and

(G) Copies of the petition in dependency or neglect, the motion to terminate, the trial court's adjudicatory order and/or order of termination, and rulings on any post-trial motions.

(h) Response to Petition on Appeal (Cross-Appeal).

(1) Within 21 days after service of the appellant's petition on appeal, any appellee may file an original and five copies of a Response to Petition on Appeal (Cross-Appeal) (Form 5). The response (cross-appeal) shall be prepared by trial counsel or by substitute counsel so long as substitute counsel has filed an entry of appearance. Except for extraordinary circumstances, substitution of counsel shall not be grounds for an extension of time.

(2) An appellee may request one extension of time of no more than 7 days in which to file a response (cross-appeal), which will be denied except upon a showing of manifest injustice.

(3) Unless the response (cross-appeal) contains no more than 6,300 words, it shall not exceed twenty pages, excluding the attachments required by this Rule 3.4(h)(3)(E). The response (cross-appeal) shall conform to the requirements of C.A.R. 32(a) and shall include:

(A) A cover page containing the information set forth in C.A.R. 32(c);

(B) A concise statement of the material facts as they relate to the issues presented (references to page and line numbers in the record are not required);

(C) A concise response to the legal issues presented (general conclusory statements such as "the trial court's ruling is supported by the law or the evidence" are not acceptable);

(D) Supporting statutes, case law, or other legal authority in support of the response, together with a statement of the legal proposition for which the legal authority stands and a concise explanation of its applicability to the issues presented on appeal; and

(E) If a cross-appeal, copies of the petition in dependency or neglect, the motion to terminate, the trial court's adjudicatory order and/or order of termination, and rulings on any post-trial motions.

(i) **Oral Argument.** Oral argument will be allowed upon the written request of a party or upon the court's own motion, unless the court, in its discretion, dispenses with oral argument. A request for oral argument shall be made in a separate, appropriately titled document filed no later than the date on which the party's petition on appeal or response is due. Unless otherwise ordered, argument shall not exceed fifteen minutes for the appellant(s) and fifteen minutes for the appellee(s).

(j) Ruling.

(1) Appeals in dependency or neglect proceedings shall be advanced on the calendar of the Court of Appeals pursuant to section 19-1-109(1), C.R.S., and shall be set for disposition upon the filing of the response to the petition on appeal or upon the time the response is due, whichever is earlier.

(2) After reviewing the petition on appeal, any response, and the record, the Court of Appeals may, by opinion in conformity with C.A.R. 35, affirm the trial court decision, reverse, or vacate the trial court decision, remand the case to the trial court, or set the case for supplemental briefing on issues raised by the parties or noticed by the court. If supplemental briefing is ordered, new counsel may be substituted upon a showing of good cause. Such request must be filed with the Court of Appeals within 7 days after the case is set for supplemental briefing.

(k) (1) **Petition for Rehearing.** A petition for rehearing in the form prescribed by C.A.R. 40(b) may be filed within 14 days after entry of judgment. The time in which to file the petition for rehearing shall not be extended.

(2) **Petition for Writ of Certiorari.** Review of the judgment of the Court of Appeals may be sought by filing a petition for writ of certiorari in the Supreme Court in accordance with C.A.R. 51. The petition shall be filed within 14 days after the expiration of the time for filing a petition for rehearing or the date of denial of a petition for rehearing by the Court of Appeals. Any cross-petition or opposition brief to a petition for writ of certiorari shall be filed within 14 days after the filing of the petition. The petition for writ of certiorari, any cross-petition, and any opposition brief shall be in the form prescribed by C.A.R. 53(a)-(c) and filed and served in accordance with C.A.R. 53(f).

(l) **Issuance of Mandate.** The mandate shall be in the form prescribed by C.A.R. 41(a) and shall issue 29 days after entry of the judgment. The timely filing of a petition for rehearing will stay the mandate until the Court of Appeals has ruled on the petition. If the petition is denied, the mandate shall issue 14 days after entry of the order denying the petition. The mandate may also be stayed in accordance with C.A.R. 41.1.

(m) **Filing and Service.** All papers required or permitted by this rule shall be filed and served in accordance with C.A.R. 25, unless otherwise provided in this rule.

(n) **Computation of Time.** Computation of any time period prescribed by this rule shall be in accordance with C.A.R. 26(a) and (c), unless otherwise provided in this rule.

Source: Entire rule added February 10, 2005, effective March 1, 2005; (a), (b)(3), (d), (g)(3)(E), (g)(3)(F), (h)(3)(C), and (h)(3)(D) amended and effective November 9, 2006; (b)(1), (b)(2), (e)(4), (e)(5), (f), (g)(1), (g)(2), (h)(1), (h)(2), (j)(2), (k), and (l) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Implementing C.A.R. 3.4 to Expedite Appeals in Dependency and Neglect Cases", see 34 Colo. Law. 47 (June 2005). For article, "Dependency and Neglect Appeals Under C.A.R. 3.4", see 36 Colo. Law. 55 (October 2007).

Court of appeals has jurisdiction to address the constitutionality of this rule as promulgated by the Colorado supreme court. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Expedited procedure under this rule does not violate procedural due process because it benefits parents by quickly correcting decisions in which their rights were terminated erroneously; benefits children, whose parents have had their rights terminated, by decreasing the time before they are either returned to their parents or permitted to be legally adopted; and furthers the state's interest in protecting children. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Expedited process does not violate procedural due process by placing court of appeals in the role of an advocate on legal issues because it does not alter the court's responsibility to thoroughly examine the record on factual issues. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

This rule sufficiently protects parents in dependency and neglect cases against the risk of an erroneous deprivation of their appellate rights by (1) allowing appellate counsel for the parents a reasonable opportunity to review an unedited transcript and to raise possible issues for appeal, and (2) allowing the assigned division of the court of appeals to review the complete record and order supplemental briefing when appropriate. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

This rule does not violate plaintiff's constitutional right to equal protection because parents whose rights are terminated under article 5 of the Colorado Children's Code are not similarly situated to parents whose rights

are involuntarily terminated under article 3 of the code. This rule applies to parents subject to dependency and neglect proceedings under article 3 of the Colorado Children's Code. As such, the proceedings focus primarily on the protection and safety of the children, not on the custodial interests of the parent. Further, such a proceeding can be initiated only by the state. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Constitutional right to effective assistance of counsel is not violated because of a lack of a complete record because this rule provides access to an unedited transcript for preparation of the petition on appeal and an opportunity to identify the issues on appeal. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

C.A.R. 2 permits an appellate court to expedite decisions and order proceedings in accordance with its direction even though this rule does not extend to permanent custody orders entered in dependency or neglect proceedings. People ex rel. K.A., 155 P.3d 558 (Colo. App. 2006).

The Colorado rules of civil procedure apply and govern the appropriate methods of service in dependency and neglect cases because neither the Colorado Children's Code nor the Colorado rules of juvenile procedure address the method by which a trial court may serve orders on parties. People ex rel. S.M.A.M.A., 172 P.3d 958 (Colo. App. 2007).

Three days must be added to the deadline for filing a notice of appeal pursuant to subsection (b) when the order appealed is served on the parties by delivery to attorney's courthouse mailbox, which constitutes service by mail. People ex rel. S.M.A.M.A., 172 P.3d 958 (Colo. App. 2007).

Appellant mother's consent is a substantive condition precedent to a valid notice of appeal. Mother's counsel was not empowered to file a notice of appeal without mother's signature or specific authorization, and her defective notice did not invoke the court's jurisdiction even overlooking the untimeliness of the notice. People ex rel. R.D., 259 P.3d 562 (Colo. App. 2011).

The language of subsection (b)(3) prohibiting extensions of time does not preclude

enlarging or suspending the deadline for filing a notice of appeal for good cause. An appellate court remains empowered to extend or suspend deadlines based on a showing of good cause. *People ex rel. A.J.*, 143 P.3d 1143 (Colo. App. 2006).

Based on the “unique circumstances exception”, court of appeals has the authority to extend the deadline for filing the notice of appeal in a dependency and neglect case. The “no extensions” provision in section (b) does not preclude application of the unique circumstances exception, because it is an exception to procedural rules limiting a court’s authority to grant exceptions. Here, the trial court must bear some responsibility for the late filing because of an ambiguous ruling and subsequent written orders. *People ex rel. A.J.H.*, 134 P.3d 528 (Colo. App. 2006).

Substitution of both parents’ counsel appropriate. Applying the criminal standard, there was good cause for the substitution of both parents’ counsel in dependency and neglect proceedings when the motions judge or-

dered supplemental briefing on the issue in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, and the substitution of mother’s counsel after the announcement of *A.L.L. v. People*, 226 P.3d 1054 (Colo. 2010). *People ex rel. C.Z.*, 262 P.3d 895 (Colo. App. 2010).

The good cause standard is the same standard recognized in criminal cases, not the standard for civil cases set forth in C.R.C.P. 121 § 1-1(2)(b). *People ex rel. C.Z.*, 262 P.3d 895 (Colo. App. 2010).

Matter is moot where guardian ad litem (GAL) failed to offer facts in supplemental brief demonstrating a current basis to terminate mother’s parental rights. Although the GAL argued on appeal that the court improperly failed to terminate mother’s rights, the child has been returned to the mother and all parties believed that the child should remain in the mother’s custody. A matter is moot when the relief sought, if granted, would have no practical legal effect on the existing controversy. *People ex rel. L.O.L.*, 197 P.3d 291 (Colo. App. 2008).

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases (Other than Appeals or Appellate Review Within C.A.R. 3.1, 3.2, 3.3 and 3.4). Except as provided in Rule 4(e), in a civil case in which an appeal is permitted by law as of right from a trial court to the appellate court, the notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within 49 days of the date of the entry of the judgment, decree, or order from which the party appeals. In appeals from district court review of agency actions, such notice of appeal shall be in addition to the statutory 45-day notice of intent to seek appellate review filed with the district court required by C.R.S. 24-4-106(9). If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (a), whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the trial court by any party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (a) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) Granting or denying a motion under C.R.C.P. 59 for judgment notwithstanding verdict; (2) granting or denying a motion under C.R.C.P. 59, to amend findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under C.R.C.P. 59, to alter or amend the judgment; (4) denying a motion for a new trial under C.R.C.P. 59; (5) expiration of a court granted extension of time to file motion(s) for post-trial relief under C.R.C.P. 59, where no motion is filed. The trial court shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the appellate court shall be stayed. A judgment or order is entered within the meaning of this section (a) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of judgment, decree, or order is transmitted to the parties by mail or E-Service, the time for the filing of the notice of appeal shall commence from the date of the mailing or E-Service of the notice.

Upon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed 35 days from the expiration of the

time otherwise prescribed by this section (a). Such an extension may be granted before or after the time otherwise prescribed by this section (a) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Comment: C.A.R. 4(a) provides for the notice of appeal to be filed with the appellate court and a copy to be served upon the trial court. Time for filing the notice of appeal is increased to 49 days.

(b) Appeals in Criminal Cases.

(1) Except as provided in Rule 4(e), in a criminal case the notice of appeal by a defendant shall be filed in the appellate court and an advisory copy served on the clerk of the trial court within 49 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed on the date of such entry. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 49 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made within 14 days after entry of the judgment. A judgment or order is entered within the meaning of this section (b) when it is entered in the criminal docket. Upon a showing of excusable neglect the appellate court may, before or at any time after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 35 days from the expiration of the time otherwise prescribed by this section (b).

Comment: C.A.R. 4(b) has been altered to make it conform more closely to C.A.R. 4(a).

(2) Unless otherwise provided by statute or Colorado appellate rule, when an appeal by the state or the people is authorized by statute, the notice of appeal shall be filed in the Court of Appeals within 49 days after the entry of judgment or order appealed from. The Court of Appeals, after consideration of said appeal, shall issue a written decision answering the issues in the case and shall not dismiss the appeal as without precedential value. The final decision of the Court of Appeals is subject to petition for certiorari to the Supreme Court.

(3) **Prosecutorial Appeals in Criminal Cases.** An appeal by the state or the people from an order dismissing one or more but less than all counts of a charging document prior to trial, including a finding of no probable cause at a preliminary hearing, shall be filed in the court of appeals unless the order is based on a determination that a statute, municipal charter provision, or ordinance is unconstitutional, in which case the appeal shall be filed in the supreme court. Appeals of orders dismissing one or more but less than all counts of a charging document shall otherwise be conducted pursuant to the procedures set forth in Rule 4.1, except petitions for rehearing and certiorari shall be permitted, and mandates shall issue, as provided by these rules.

(c) Appellate Review of Felony Sentences.

(1) **Availability of Review.** Except in those cases provided for in subsection (e) of this Rule, a person upon whom sentence is imposed for conviction of a felony shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, the public interest, and the sufficiency and accuracy of the information on which the sentence was based.

(I) If the appeal review of conviction is sought in a case where there has been a trial and conviction on the merits, appellate review of the propriety of the sentence will be a part of and be treated in the same manner as the review of the conviction.

(II) If the appeal is to review a sentence following a plea of guilty or nolo contendere, or resentencing, where the imposition of sentence was the only issue before the court, then the following abbreviated procedure for appellate review of sentences will be utilized:

(A) The notice of appeal must be filed within 49 days from the date of the imposition of sentence. The notice shall be filed with the appellate court with an advisory copy served

on the clerk of the trial court which imposed the sentence. The time for filing the notice of appeal may be extended by the appellate court.

(B) Except as provided by this Rule, the Colorado Appellate Rules governing criminal appeals shall apply to appellate review of sentences.

Comment: The change in the title and deletion of subsection (d) of this rule became necessary because of repeal of C.R.S. 18-1-409(2.1) and (2.2) and repeal of C.R.S. 18-1-409.5 effective July 1, 1981. In 1984 this rule was changed to make it conform more closely to C.A.R. 4(a) and (b).

(d) Appeals of Cases in Which a Sentence of Death Has Been Imposed.

(1) **Availability of Review.** Whenever a sentence of death is imposed, the Supreme Court shall review the propriety of the sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information upon which it was based.

If the Supreme Court determines that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, or that, as a matter of law, the sentence is not supported by the evidence, a sentence of death shall not thereafter be imposed.

(2) Procedure and Conditions.

(I) The trial court, at the time of imposition of a sentence of death, shall enter an order staying execution of the judgment and sentence until further order of the Supreme Court, and shall direct the clerk of the trial court to mail to the Supreme Court, within 7 days of imposition of sentence, a copy of the judgment, sentence, and mittimus.

(II) The record, as described in subsection (3) of this Rule, shall be prepared in the same form as any other record to be presented to the Supreme Court and shall be transmitted by the clerk of the trial court within 42 days of imposition of sentence, or such additional time as may be allowed by the Supreme Court.

(3) **Record on Appeal.** In appeals under subsection (e) of this Rule, the following items shall be included in the record on appeal:

(I) The indictment or information upon which the sentence is based; a verbatim transcript of the entire sentencing proceeding; the instructions given by the trial court and tendered by the parties in the sentencing proceeding; all exhibits admitted or offered during the trial and at the sentencing proceeding; all verdict forms submitted to the jury; and the judgment, sentence, and mittimus.

(II) Such other portions of the record as may be designated under C.A.R. 10(b) or as may be ordered by the Supreme Court.

(e) **Appeal by an Inmate Confined in an Institution.** If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (a) amended August 23, 1984, effective January 1, 1985; (b)(2) amended July 7, 1988, effective August 1, 1988; (a) amended and effective June 18, 1992; (a) and (d) amended March 17, 1994, effective July 1, 1994; (c)(1)(I) amended and effective April 7, 1994; (a) corrected and effective January 9, 1995; entire rule amended and adopted May 17, 2001, effective July 1, 2001; (b)(1) corrected June 12, 2001, effective July 1, 2001; (b)(3) added and adopted June 27, 2002, effective July 1, 2002; (a) amended and effective September 9, 2004; (a) amended and effective November 9, 2006; (a) amended and effective February 7, 2008; (d)(2) amended and effective May 10, 2010; (a), (b)(1), (b)(2), (c)(1)(II)(A), and (d)(2) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

- I. General Consideration.
- II. Civil Cases.

- III. Criminal Cases.
- IV. Review of Sentences.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Defects in Ineffective Assistance Standards Used By State Courts", see 50 U. Colo. L. Rev. 389 (1979). For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Compliance with the rules of court is prerequisite to appellate jurisdiction, and actions undertaken to avoid application of those rules, whether by the parties or by the trial court, cannot operate to confer jurisdiction. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982).

Although adherence to strict jurisdictional notions may sometimes create a needless waste of judicial resources. In re Ross, 670 P.2d 26 (Colo. App. 1983).

Rule is procedural requirement without jurisdictional significance. Trial court's preparation and transmission of findings with an order nunc pro tunc to date of original sentencing was valid because trial court did not lose jurisdiction by initial oversight. People v. Abeyta, 677 P.2d 393 (Colo. App. 1983).

New requirement that notice of appeal be filed with the appellate court with an advisory copy served on the clerk of the trial court is jurisdictional, and strict compliance with the rule is required. Therefore, a notice of appeal erroneously filed in the trial court was of no effect under the new rules, and the trial court was without authority to grant an extension of time to correctly file a notice of appeal. Collins v. Boulder Urban Renewal Auth., 684 P.2d 952 (Colo. App. 1984).

The timely filing of notice of appeal is a jurisdictional prerequisite to appellate review. Estep v. People, 753 P.2d 1241 (Colo. 1988); Hillen v. Colo. Comp. Ins. Auth., 883 P.2d 586 (Colo. App. 1994).

Reduction of charge. In reducing a charge, the court in effect dismisses the greater charge and substitutes a lesser one. Through such action, the court does not dismiss the case in its entirety; therefore, the appeal of the case is governed by the procedures set forth in subsection (b)(3) of this rule and in C.A.R. 4.1, not subsection (b)(2), and must be filed within 10 days of the date of the order. People v. Severin, 122 P.3d 1073 (Colo. App. 2005).

Court does not pass upon plaintiff's claim that stay order was improperly entered where he did not formally protest that order by filing either a notice of appeal under this rule or a motion under C.A.R. 8. DiMarco v. Dept. of Rev., MVD, 857 P.2d 1349 (Colo. App. 1993).

This rule is inapplicable to review of orders of the industrial appeals panel. Picken v. Indus. Claim Appeals Office, 874 P.2d 485 (Colo. App. 1994).

Trial court may not correct jurisdictional defects in the appeal. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975).

Rule on appellate review of criminal sentences controls over conflicting statute, § 18-1-409, which had not been amended after rule was changed. People v. Arevalo, 835 P.2d 552 (Colo. App. 1992).

However, § 18-1-409 prevails over a conflicting supreme court rule in substantive matters. To the extent that subsection (c)(1) of this rule provides that every defendant may seek review of the propriety of his or her sentence, it conflicts with the substantive provisions of § 18-1-409 (1). People v. Prophet, 42 P.3d 61 (Colo. App. 2001).

A nunc pro tunc judgment may not be used to circumvent the time requirements of the rules of procedure. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975).

Applied in Carr v. District Court, 157 Colo. 226, 402 P.2d 182 (1965); City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972); People v. Samora, 188 Colo. 74, 532 P.2d 946 (1975); People v. Martinez, 190 Colo. 507, 549 P.2d 758 (1976); People v. Hinchman, 40 Colo. App. 9, 574 P.2d 866 (1977); Emerick v. Greene, 40 Colo. App. 246, 575 P.2d 441 (1977); Schenk v. Indus. Comm'n, 40 Colo. App. 350, 579 P.2d 1171 (1978); People v. McKnight, 41 Colo. App. 372, 588 P.2d 886 (1978); People v. Reyes, 42 Colo. App. 73, 589 P.2d 1385 (1979); People v. Mikkleson, 42 Colo. App. 77, 593 P.2d 975 (1979); People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980); Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980); People v. Foster, 200 Colo. 283, 615 P.2d 652 (1980); People v. Martinez, 628 P.2d 608 (Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Hunt, 632 P.2d 572 (Colo. 1981); People v. Byerley, 635 P.2d 542 (Colo. 1981); People v. District Court, 638 P.2d 65 (Colo. 1981); People v. Boivin, 632 P.2d 1038 (Colo. App. 1981); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982); People v. Rafferty, 644 P.2d 102 (Colo. App. 1982); People v. Dennis, 649 P.2d 321 (Colo. 1982); People v. Cole, 648 P.2d 687 (Colo. App. 1982); People v. Peterson, 656 P.2d 1301 (Colo. 1983); Acme Delivery Serv., Inc. v. Samsonite Corp., 663 P.2d 621 (Colo. 1983); Church v. Am. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987); People v. Harmon, 3 P.3d 480 (Colo. App. 2000); People v. Banuelos-Landa, 109 P.3d 1039 (Colo. App. 2004); Harris v. Reg'l Transp. Dist., 155 P.3d 583 (Colo. App. 2006).

II. CIVIL CASES.

Timely filing of a notice of appeal is mandatory and jurisdictional. Chapman v. Miller,

29 Colo. App. 8, 476 P.2d 763 (1970); Concelman v. Ray, 36 Colo. App. 181, 538 P.2d 1343 (1975); In re Foster, 39 Colo. App. 130, 564 P.2d 429 (1977).

Compliance with section (a) is mandatory. Failure to comply deprives the appellate court of jurisdiction and precludes a review of the merits. Bosworth Data Servs., Inc. v. Gloss, 41 Colo. App. 530, 587 P.2d 1201 (1978).

Time limitation contained in section (a) is jurisdictional. Federal Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

The filing of a notice of appeal is mandatory and a jurisdictional prerequisite for appellate review of a lower court decision. People v. Silvola, 198 Colo. 228, 597 P.2d 583 (1979).

Strict compliance with section (a) is essential. Laugesen v. Witkin Homes Inc., 29 Colo. App. 58, 479 P.2d 289 (1970).

Any appeal of the dismissal of a claim as barred by the Governmental Immunity Act, article 10 of title 24, C.R.S., must be sought immediately within the time limits specified in this rule, or it is barred. Buckles v. State, Div. of Wildlife, 952 P.2d 855 (Colo. App. 1998).

Jurisdictional defect created which warranted dismissal. Where trial court took no action with respect to appellant's posttrial motion within 60 days after that motion was filed, that motion was "deemed denied", pursuant to C.R.C.P. 59(j), so that appellant's failure to file notice of appeal within 45 days after the posttrial motion was "deemed denied" created a jurisdictional defect in the appeal which warranted dismissal under this rule. Baum v. State Bd. for Cmty. Colls., 715 P.2d 346 (Colo. App. 1986); Anderson v. Molitor, 738 P.2d 402 (Colo. App. 1987).

Lack of a proper order determining a C.R.C.P. 59 motion was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the rule 59 motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Temporary orders as to maintenance are reviewable as a final judgment even if there has not been a final judgment in the form of a decree of dissolution. In re Nussbeck, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

Post-trial motions for attorney fees are subject to the provisions of C.R.C.P. 59 and the effect of such motions upon the time limitations of this rule are as specified in C.R.C.P. 59. Torrez v. Day, 725 P.2d 1184 (Colo. App. 1986).

Requirements of this rule must be met for appeals of judgments for attorney fees. The award of attorney fees in a case is sufficiently separate from an underlying judgment on the merits to require that a separate notice of appeal be filed within the time limits of this rule from the judgment awarding attorney fees independently of the judgment entered on the merits of

the underlying case. If this is not done, the court of appeals is not vested with subject matter jurisdiction to determine issues related to the award of attorney fees. Dawes Agency v. Am. Prop. Mortg., 804 P.2d 255 (Colo. App. 1990).

Judgment awarding prejudgment interest is not final until the amount of such interest is reduced to a sum certain. Grand County Custom Homebuilding, LLC v. Bell, 148 P.3d 398 (Colo. App. 2006).

Timely filing of motion for reconsideration of a completed post-trial ruling on an attorney fees issue tolls the time for filing a notice of appeal under this rule until the court determines the motion or the motion is deemed denied after 60 days pursuant to C.R.C.P. 59(j). Jensen v. Runta, 80 P.3d 906 (Colo. App. 2003).

The court of appeals is not usually precluded from reviewing an appeal merely because the notice of appeal was premature. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994).

Calculation of timeliness of notice of appeal. The timeliness of a notice of appeal is calculated from the date the judgment appealed from is entered on the register of actions. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

Construction given "announced" within context of section (a) for purposes of resolving timeliness of notices of appeal. Oral ruling on posttrial motions in presence of parties and their counsel did not constitute "announcement" of trial court's judgment. Judgment was not "announced" until signing of the order in its final form thereby deferring commencement of the running of the time to appeal until the parties were notified by mail of such action. City of Colo. Springs v. Timberland Assocs., 783 P.2d 287 (Colo. 1989).

For purposes of timeliness of notice of appeal, order of dismissal is final judgment and motion for reconsideration operated to suspend the running of time until the ruling thereon. Small v. General Motors, 694 P.2d 374 (Colo. App. 1984).

Failure to file timely notice of appeal requires dismissal. An appeal must be dismissed when appellant has failed to file a timely notice of appeal under section (a). Federal Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

Jurisdictionally defective notice insufficient. A notice of appeal which is jurisdictionally defective is not a "timely notice of appeal" as contemplated in section (a). Watered Down Farms v. Rowe, 39 Colo. App. 169, 566 P.2d 710 (1977), rev'd on other grounds, 195 Colo. 152, 576 P.2d 172 (1978).

Notice of appeal not timely filed. Earlier notice of appeal, which related to probate of will, did not provide notice of appeal of order vacating notices of lis pendens to estate prop-

erty, and since no timely appeal was filed, court lacked jurisdiction over appeal. *Matter of Estate of Anderson*, 727 P.2d 867 (Colo. App. 1986).

Proponent's notice of appeal as to the probate court's November order denying a partial summary judgment was timely filed in March since the November court order adjudicated fewer than all of proponent's pending claims in the proceedings and, therefore, did not constitute a final judgment, but the court's intervening February order resolved the remaining issue pending between the parties. In *re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

Notice of appeal timely filed when filed within 45 days of amended order. In trial involving title to a road segment, original order expressly deferred determination of road segment's width to a later date, and the notice of appeal was timely filed after trial court amended the order to incorporate the road segment's width. *Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray*, 215 P.3d 1277 (Colo. App. 2009).

Defendant's notice of appeal from automatic denial of motion to alter and amend judgment pursuant to C.R.C.P. 59(j) was untimely and prevents prosecution of the appeal. *Sandoval v. Trinidad Area Health Ass'n*, 752 P.2d 1062 (Colo. App. 1988).

When second motion to alter or amend not prerequisite to filing of notice. Where an appellant seeks no greater or different relief on appeal than that asked of the trial court in the motion directed to the original judgment, where appellant is not urging any new alleged errors arising from the amended judgment, and where the amended judgment is not the result of a post-judgment hearing involving controverted issues of fact, the appellant need not file another motion to alter or amend or for a new trial after entry of the amended judgment as a prerequisite to the filing of his notice of appeal. In *re Foster*, 39 Colo. App. 130, 564 P.2d 429 (1977).

Effect of filing motion for new trial. The running of the time for filing a notice of appeal is terminated upon the timely filing of a motion for new trial, and the time begins to run anew when that motion is denied. A subsequent motion for new trial that raises issues that either were or could have been raised in the movant's prior motion does not affect the running of the time for filing the notice of appeal. *Wright Farms, Inc. v. Weninger*, 669 P.2d 1054 (Colo. App. 1983); *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Denial of motion for new trial starts filing period. Until such time as the motion, for new trial is denied, plaintiff's time within which it may file an appeal in the supreme court does not even start to run. *Commercial Credit Corp. v. Frederick*, 164 Colo. 5, 431 P.2d 1016 (1967).

Where final order appealed from is denial of a C.R.C.P. 60(b) motion for relief from judgment, and C.R.C.P. 59 motion to reconsider such denial has been filed, time for filing notice of appeal runs from denial of C.R.C.P. 59 motion, not from the date of the underlying judgment. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Final entry of judgment for purposes of timely notice of appeal under this rule based on denial of new trial motion is date on which court filed written judgment in fixed amount on special verdict. *Vallejo v. Eldridge*, 764 P.2d 417 (Colo. App. 1988).

Rule 60(b) motion is appealable independently of an underlying judgment, and, where the notice of appeal was timely as to the trial court's order denying defendant's motion to set aside the judgment dismissing the action, the appellate court has jurisdiction to consider it. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

A notice of appeal must be filed within 45 days from the entry of an order granting or denying a motion filed pursuant to C.R.C.P. 59. *Campbell v. McGill*, 810 P.2d 199 (Colo. 1991).

When a party timely files a C.R.C.P. 59 motion, the running of the 45 days for the notice of appeal under section (a) of this rule is terminated and does not begin to run anew until either a ruling on the motion within 60 days or when the motion is deemed denied at the end of the 60-day period. *Stone v. People*, 895 P.2d 1154 (Colo. App. 1995).

If a C.R.C.P. 59 motion is timely filed, the time for filing a notice of appeal commences when the trial court determines that motion or when the motion is deemed denied under the rule. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

Filing notice gives extra time to all parties. The timely filing of a notice of appeal by any party affords an additional 14 days to all other parties, regardless of whether the party subsequently appealing was an appellee in the initial appeal. *Kitto v. Gilbert*, 39 Colo. App. 374, 570 P.2d 544 (1977).

Effect of filing motion to alter or amend judgment. The filing of a motion to alter or amend a judgment tolls the running of the time for filing notice of appeal. *Valenzuela v. Mercy Hosp.*, 34 Colo. App. 5, 521 P.2d 1287 (1974).

Amendment of judgment does not extend filing period. Generally where an appellant procures an amendment of a judgment, the time period in which to file an appeal will not be extended. In *re Everhart*, 636 P.2d 1321 (Colo. App. 1981); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003).

Neither does petition to show cause. The filing of a petition to show cause in the supreme court within a 10-day period following entry of

final judgment, coupled with the filing of a motion in a trial court to suspend proceedings, does not stay the time to file a motion for a new trial under C.R.C.P. 59 or the time to proceed under C.A.R. 11 or this rule. *Walter v. Walter*, 136 Colo. 405, 318 P.2d 221 (1957).

Nor does pendency of motion for attorney fees and costs. The pendency of such a motion does not preclude a judgment on the merits from becoming final or toll the running of the 45-day period for filing a notice of appeal, at least where attorney fees are sought pursuant to a statutory fee-shifting provision rather than as damages. *Goodwin v. Homeland Cent. Ins. Co.*, 172 P.3d 938 (Colo. App. 2007).

Parties may not waive requirement of timely filing. Parties may not by their independent action amend or waive the jurisdictional requirement of timely filing of a notice of appeal under section (a). *Concelman v. Ray*, 36 Colo. App. 181, 538 P.2d 1343 (1975).

Court may extend the time for filing a notice of appeal upon a showing of excusable neglect only in cases that are appealed from a trial court. Section (a) does not apply to appeals from rulings of an administrative agency. *Martinez v. Colo. State Pers. Bd.*, 28 P.3d 978 (Colo. App. 2001).

Upon showing of excusable neglect, trial court may extend the time for filing the notice of appeal for a period not to exceed 30 days. *Chapman v. Miller*, 29 Colo. App. 8, 476 P.2d 763 (1970).

Finding of excusable neglect is supported by the record and binding upon review. *F.W. Woolworth Co. v. State Dept. of Rev.*, 699 P.2d 1 (Colo. App. 1984).

Reason for late filing critical in determination of excusable neglect. Although the number of days that a filing is late may be one factor in determining whether neglect is excusable for purposes of extending time to file notice of appeal, the critical question is the reason for the late filing. *Bosworth Data Servs., Inc. v. Gloss*, 41 Colo. App. 530, 587 P.2d 1201 (1978).

Negligence of counsel generally is not considered "excusable neglect" which would justify the late filing of a notice of appeal under section (a). *Trujillo v. Indus. Comm'n*, 648 P.2d 1094 (Colo. App. 1982).

Nor attorney's press of work. The press of work or other activities of an attorney do not constitute excusable neglect. *Cox v. Adams*, 171 Colo. 37, 464 P.2d 513 (1970); *Laugesen v. Witkin Homes, Inc.*, 29 Colo. App. 58, 479 P.2d 289 (1970).

Miscounting days within which to file notice of appeal does not constitute excusable neglect. *Bosworth Data Servs., Inc. v. Gloss*, 41 Colo. App. 530, 587 P.2d 1201 (1978); *Kronkow, Inc. v. Wood*, 44 Colo. App. 462, 615 P.2d 71 (1980).

Reliance on post office's assurance of timely delivery of notice of appeal did not constitute excusable neglect. *Ford v. Henderson*, 691 P.2d 754 (Colo. 1984).

Reliance on office staff to make appropriate filings did not constitute excusable neglect. *Hillen v. Colo. Comp. Ins. Auth.*, 883 P.2d 586 (Colo. App. 1994).

Doctrine of "unique circumstances" and finding of excusable neglect. When counsel erroneously filed motion for extension of time to file notice of appeal of an order terminating parental rights with trial court instead of appellate court within 45-day period and counsel relied on trial court's erroneous extension of deadline and filed notice of appeal after the 45-day period but within the 30-day extension period for excusable neglect, court of appeals had jurisdiction to consider a request for late filing under "unique circumstances" doctrine and failure to find excusable neglect to justify extension of time was abuse of discretion. *P.H. v. People in Interest of S.H.*, 814 P.2d 909 (Colo. 1991).

Refusal of extension was not abuse of discretion. Where there is no showing of excusable neglect, there is no abuse of discretion on the part of the trial court in its refusal to extend the time for filing the notice of appeal. *Long v. Ross*, 30 Colo. App. 436, 494 P.2d 128 (1972).

Forty-five-day time limit for filing appeal with court of appeals in tax assessment cases, rather than statutory time period, is applicable when appeal has first been filed with state board of assessment appeals and not in district court. *Denver v. Bd. of Assessment Appeals*, 748 P.2d 1306 (Colo. App. 1987).

"Unique circumstances" doctrine may be applied to allow the filing of notice of appeal in a kinship adoption proceeding governed by C.A.R. 4(a) beyond the 75-day jurisdictional deadline. Court shall consider the totality of the circumstances in decision to apply doctrine. *In re C.A.B.L.*, 221 P.3d 433 (Colo. App. 2009).

III. CRIMINAL CASES.

Appellate court may, for good cause shown, enlarge the time for filing under section (b). *People v. Allen*, 182 Colo. 395, 513 P.2d 1060 (1973); *People v. Baker*, 104 P.3d 893 (Colo. 2005).

Where public defender was notified of appointment to represent petitioner on last day on which petitioner could file late notice of appeal, court of appeals should have either allowed notice of appeal or given petitioner additional time to gather more supporting information rather than denying motion for out of time filing. *Weason v. Colo. Court of Appeals*, 731 P.2d 736 (Colo. 1987).

A motion filed after entry of the order challenged on appeal does not extend the time for the prosecution to file its notice past the 45 days allowed by this rule. *People v. Retallack*, 804 P.2d 279 (Colo. App. 1990).

But trial court cannot extend time for filing past 75 days. A trial court has no authority or jurisdiction to extend the time for filing of notice of appeal from criminal conviction past 60 days (now 75 days) after the entry of the judgment. *People v. Allen*, 182 Colo. 395, 513 P.2d 1060 (1973).

The excusable neglect provision does not apply to appeals by the people. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

The civil cross-appeal rule that allows for sequential submissions does not apply in criminal cases. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

An order granting a new trial is a final order pursuant to § 16-12-102, therefore, prosecution must file its appeal within 45 days of the order. *People v. Curren*, 228 P.3d 253 (Colo. App. 2009).

Order granting motion for a new trial not final judgment for purposes of appeal, and therefore people's failure to file appeal within 45 days of such order did not render subsequent appeal untimely. *People v. Campbell*, 738 P.2d 1179 (Colo. 1987).

Alleged errors must be preserved by objection and motion. Proper procedure necessitates that alleged error, including errors of a constitutional nature, be preserved by raising same by objection during the trial and by motion for a new trial. *People v. Sanchez*, 180 Colo. 119, 503 P.2d 619 (1972).

Timely but defective notice was adequate to invoke appellate jurisdiction. *People v. Bost*, 770 P.2d 1209 (Colo. 1989).

Perfection of appeal divests trial court of jurisdiction. Unless otherwise specifically authorized by statute or rule, once an appeal has been perfected, the trial court has no jurisdiction to issue further orders in the case relative to the order or judgment appealed from. Consequently, should it be necessary for the trial court to act, other than in aid of the appeal or pursuant to specific statutory authorization, the proper course would be for a party to obtain a limited remand from the appellate court. *People v. Dillon*, 655 P.2d 841 (Colo. 1982).

Sentence imposed after revocation of probation is final judgment. Where the trial court has initially imposed sentence on a defendant and has suspended execution of the sentence and granted probation, which is thereafter revoked, the resulting sentence imposed after revocation of probation is the final judgment. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

As is reversal of order imposing costs. The final judgment for purposes of appeal was en-

tered when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal taken more than 30 days after sentencing was proper. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

IV. REVIEW OF SENTENCES.

Misdemeanor sentence. There is no provision for appellate review of the propriety of a misdemeanor sentence. *People v. Roberts*, 668 P.2d 977 (Colo. App. 1983).

Sentencing by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Wide latitude will be given the trial court's final decision since it is in the best position to balance the many factors which must be considered in tailoring an appropriate sentence in each individual case. *People v. Valencia*, 630 P.2d 85 (Colo. 1981).

But discretion not unrestricted. The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing decisions should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Record to include reasons for imposition of sentence. Hereafter in felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

The statement of reasons that sentencing judge must state on record need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Factors considered in sentencing. Some of the more common considerations significant to the sentencing process are: The gravity of the offense in terms of harm to person or property; the gravity of the offense in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation, and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative

chosen. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

In reviewing the district court's imposition of sentence, the supreme court is to consider the following factors: The nature of the offense, the character of the offender, the public interest in safety and deterrence, and the sufficiency and accuracy of the information on which the sentence was based. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

An appellate court must consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence in reviewing a sentence claimed to be excessive. *People v. Valencia*, 630 P.2d 85 (Colo. 1981).

Review of propriety of sentence limited. Neither the court of appeals nor the supreme court of Colorado has jurisdiction to review the propriety of a sentence except on direct appeal from the initial sentence, and then only under the limitations established in this rule and in § 18-1-409. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Record to justify extended term sentence. Where a sentence is imposed for an extended term, the record must clearly justify the decision of the sentencing judge. *People v. Valencia*, 630 P.2d 85 (Colo. 1981).

Sentence cannot be modified absent abuse of discretion. In reviewing the record in a proceeding under this rule, the sentence imposed cannot be modified unless it appears to the appellate court that the trial judge abused his discretion in imposing the sentence. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975).

Trial court does not err in failing to hold hearing. When a defendant does not raise a question or move for a new trial, but raises the question for the first time on appeal of conviction, the trial court does not err in failing to hold a hearing "sua sponte" to determine such. *People v. Sanchez*, 180 Colo. 119, 503 P.2d 619 (1972).

Invoking fifth amendment at codefendant's trial. Where a defendant is appealing his sentence and fears that his testimony in the trial of his codefendant might be used at a subsequent hearing to enhance the sentence should it be vacated, he may invoke his fifth amendment right against self-incrimination. *People v. Villa*, 671 P.2d 971 (Colo. App. 1983).

The language of subsection (b)(2) is plain and unambiguous and dictates that if an appeal by the People is authorized by statute, the court of appeals must issue a written decision. *People v. Jackson*, 972 P.2d 698 (Colo. App. 1998).

Rule 4.1. Interlocutory Appeals in Criminal Cases

(a) **Grounds.** The state may file an interlocutory appeal in the supreme court from a ruling of a district court granting a motion under Crim. P. 41(e) and (g) and Crim. P. 41.1(i) made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion and to the supreme court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) **Limitation on Time of Issuance.** No interlocutory appeal shall be filed after 14 days from the entry of the order complained of. It shall not be a condition for the filing of such interlocutory appeal that a motion for a new trial or rehearing shall have been filed and denied in the trial court.

(c) **How Filed.** To file an interlocutory appeal the state, within the time fixed by this Rule, shall file the notice of appeal with the clerk of the appellate court with an advisory copy served on the clerk of the trial court.

(d) **Record.** The record for an interlocutory appeal shall consist of the information or indictment, the plea of the defendant or the defendants, the motions filed by the defendant or defendants on the grounds stated in section (a) above, the reporter's transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the parties may designate (subject to the provisions in C.A.R. 11(b) pertaining to exhibits of bulk), the order of court ruling on said motions together with the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. After the filing of the record, such other exhibits or reasonable copies, facsimiles, or photographs thereof shall be transmitted by the clerk of the trial court to the appellate court as the appellate court may order. The record shall be filed within 14 days of the date of filing the notice of appeal.

(e) **Appearances.** The state in these proceedings shall be represented by the district attorney, and briefs shall be prepared by him and responsive briefs or pleadings served upon him.

(f) **Briefs.** Within 14 days after the record has been filed in the supreme court, the state shall file ten copies of a typewritten, mimeographed, or otherwise reproduced brief, and within 14 days thereafter, the appellee shall file ten copies of a typewritten, mimeographed, or otherwise reproduced answer brief, and the state shall have 7 days after service of said answer brief to file ten copies of a typewritten, mimeographed, or otherwise reproduced reply brief.

(g) **Disposition of Cause.** No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

(h) **Time.** The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

Source: (b), (d), and (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Rule not violative of equal protection. The provisions of this rule permitting only the prosecution to enter an interlocutory appeal are not violative of equal protection, since the prosecution is precluded from placing the defendant in double jeopardy after the final verdict has been reached, and its only meaningful avenue of appeal must be found in a prejudgment proceeding. *People v. Traubert*, 199 Colo. 322, 608 P.2d 342 (1980).

This rule requires filing of an interlocutory appeal within ten days after entry of an appealable order. However, where there was no indication that entry of a motion to reconsider was an attempt to circumvent the appeals process or delay the proceedings, the prosecution complied with this rule by filing an appeal within ten days after the modified ruling. *People v. Melton*, 910 P.2d 672 (Colo. 1996).

In order to toll the time for filing an interlocutory appeal, a motion to reconsider a trial court order of suppression must be filed within ten days of the date of the order of suppression. *People v. Powers*, 47 P.3d 686 (Colo. 2002).

This rule provides an appeal for the prosecution rather than defendant, therefore, the court does not have jurisdiction to address any issues resolved by the trial court in favor of the prosecution. *People v. Gothard*, 185 P.3d 180 (Colo. 2008).

Issues raised by defendant are not normally included. An interlocutory appeal by the people under this rule does not normally include issues raised by the defendant. *People v. Barton*, 673 P.2d 1005 (Colo. 1984).

The supreme court has no jurisdiction to address a ruling adverse to the defendant in an interlocutory appeal under this rule. *People v. Oates*, 698 P.2d 811 (Colo. 1985); *People v. Griffin*, 727 P.2d 55 (Colo. 1986); *People v. Weston*, 869 P.2d 1293 (Colo. 1994).

This rule does not interfere with defendant's rights to appeal his conviction after a verdict has been reached. *People v. Traubert*, 199 Colo. 322, 608 P.2d 342 (1980).

This rule is designed as procedural device to facilitate review, and does not represent a constitutional right on the part of either the defendant or the state. *People v. Renfrow*, 172 Colo. 399, 473 P.2d 957 (1970).

Reduction of charge. In reducing a charge, the court in effect dismisses the greater charge and substitutes a lesser one. Through such action, the court does not dismiss the case in its entirety; therefore, the appeal of the case is governed by the procedures set forth in C.A.R. 4(b)(3) and in this rule, not C.A.R. 4(b)(2), and must be filed within 10 days of the date of the order. *People v. Severin*, 122 P.3d 1073 (Colo. App. 2005).

Interlocutory appeals may not be employed to obtained pretrial review of issues not covered by this rule. *People v. Dailey*, 639 P.2d 1068 (Colo. 1982); *People v. Cummings*, 706 P.2d 766 (Colo. 1985); *People v. Weston*, 869 P.2d 1293 (Colo. 1994).

Interlocutory appeal rule may not be employed to "piggyback" issues not embraced by that rule for pretrial review. *People v. Morrison*, 196 Colo. 319, 583 P.2d 924 (1978).

Where a suppression order is based on conclusions that statements were the product of an illegal arrest and of a custodial interrogation not preceded by Miranda warnings, a district court must make sufficient findings of fact and conclusions of law to identify each of the statements at issue and to permit appellate review of its rulings with regard to whether the statements must be suppressed. *People v. Haurey*, 859 P.2d 889 (Colo. 1993).

Appellate court has the responsibility of ascertaining whether the trial court's legal con-

clusions are supported by sufficient evidence and whether the trial court applied the correct legal standard. *People v. Brazzel*, 18 P.3d 1285 (Colo. 2001).

Trial court's findings of fact are entitled to deference by a reviewing court, but when the absence of factual findings regarding key contested issues hinders appellate review, or when unresolved evidentiary conflicts exist with regard to material facts, case must be remanded to the trial court for further fact-finding. *People v. Brazzel*, 18 P.3d 1285 (Colo. 2001).

Review of suppression hearings. This rule is designed to review rulings of the trial court made upon suppression hearings under *Crim. P. 41(e)* and *Crim. P. 41(g)*. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970); *People v. Cobbin*, 692 P.2d 1069 (Colo. 1984).

Interlocutory appeals are limited to motions to suppress, and it is contemplated that the motion be disposed of prior to trial. *People v. Voss*, 191 Colo. 338, 552 P.2d 1012 (1976).

And only from adverse rulings. Interlocutory appeals under this rule may only be appealed from adverse rulings on *Crim. P. 41* motion. *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971). See *People v. McNulty*, 173 Colo. 491, 480 P.2d 560 (1971).

Unless an adverse trial court ruling is within the scope of *Crim. P. 41(e)* and *Crim. P. 41(g)*, it is not within an appellate court's jurisdiction on interlocutory appeal under this rule. *People v. Patterson*, 175 Colo. 19, 485 P.2d 494 (1971). See *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970); *People v. Braunthal*, 31 P.3d 167 (Colo. 2001).

Only three circumstances for interlocutory appeal of a suppression order. Review is proper where evidence was suppressed due to: (1) An unlawful search and seizure; (2) an involuntary confession or admission; or (3) an improperly ordered or insufficiently supported, nontestimonial identification. *People v. Braunthal*, 31 P.3d 167 (Colo. 2001).

Prosecution's brief and the record do not support certification that defendant's statements form a substantial part of the evidence where defendant's statements were made during transport as a part of a non-material, benign interchange meant to solace the defendant and where the officer did not immediately prepare any notes or reports documenting the statements. *People v. MacCallum*, 925 P.2d 758 (Colo. 1996).

Statements suppressed by trial court held to constitute substantial part of proof of charges pending against defendant; therefore, prosecution was entitled to bring interlocutory appeal. *People v. Mendoza-Rodriguez*, 790 P.2d 810 (Colo. 1990).

Suppression order based upon sanctions was not reviewable under this rule. However, the court could consider the issue on an inter-

locutory appeal under C.A.R. 21. *People v. Casias*, 59 P.3d 853 (Colo. 2002).

Supreme court will not expand jurisdiction. The supreme court will not stray beyond the scope of its interlocutory appeal jurisdiction set forth in this rule and will not consider rulings issued in a preliminary hearing held in conjunction with a motion to suppress. *People v. Singleton*, 174 Colo. 138, 482 P.2d 978 (1971).

If the evidence or statement suppressed is not a "substantial part" of the proof which may be offered against the defendant, the supreme court will not address the substantive issues raised by the interlocutory appeal. *People v. Harding*, 671 P.2d 975 (Colo. App. 1983).

Where review of the record provided on appeal convinced court that the defendant's statement, suppressed under *Crim. P. 41(g)* did not form a "substantial part" of the proof to be offered against the defendant, the court refused to address the substantive issues raised by the prosecution. *People v. Valdez*, 621 P.2d 332 (Colo. 1981).

An order granting a motion to sever a count for separate trial is not within scope of rule. *People v. Wallace*, 724 P.2d 670 (Colo. 1986).

Proceeding is interlocutory in nature if it intervenes between the commencement and the final decision of a case. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

An appeal could not be interlocutory where it was from a final order after trial. *People v. Voss*, 191 Colo. 338, 552 P.2d 1012 (1976).

Ruling granting a defendant's pretrial motion to suppress is subject to interlocutory appeal under this rule. *People v. Nunez*, 658 P.2d 879 (Colo. 1983).

Lineup identification is question for trial, and not interlocutory appeal. The question of whether eyewitness identification evidence was obtained from a lineup that was overly suggestive is a matter to be resolved at trial; it is not within the ambit of the interlocutory appeal rule since it is not a proper subject of a pretrial suppression hearing. *People v. Thornburg*, 173 Colo. 230, 477 P.2d 372 (1970).

Order suppressing statement which prosecution sought to use only for impeachment purposes if defendant elected to testify is not subject to interlocutory appeal because it was not a substantial part of the prosecution's proof. *People v. Garner*, 736 P.2d 413 (Colo. 1987).

But suppression order was properly the subject of an interlocutory appeal under this rule where the suppressed statements concerned a murder conspiracy, jointly fabricated alibi, and videotaped confession that constituted a substantial part of the proof of the pending charges. *People v. Matheny*, 46 P.3d 453 (Colo. 2002).

A ruling limiting the scope of cross-examination of a witness in a criminal case is not appealable under this rule. *People v. Haurey*, 859 P.2d 889 (Colo. 1993).

Record did not support the prosecution's certification that statements were a substantial part of the evidence. *People v. Mounts*, 801 P.2d 1199 (Colo. 1990).

Interlocutory appeal unavailable in delinquency proceedings. An interlocutory appeal is not available to either the state or the respondent in a delinquency proceeding under the Colorado children's code. *People in Interest of P.L.V. v. P.L.V.*, 172 Colo. 269, 472 P.2d 127 (1970); *People in Interest of G.D.K. v. G.D.K.*, 30 Colo. App. 54, 491 P.2d 81 (1971). See *People in Interest of P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971).

Findings on second motion held sufficient to support ruling in earlier case. Where in one case the district judge, in denying the motion to suppress, did not make sufficient findings, but in another case the findings upon denial of the motion to suppress were amply sufficient, since the findings in the second case were by the same court, although by a different judge, since

the rulings by both judges were the same, and since the parties and the search — and in substantial effect the testimony — are identical, the supreme court is justified in considering the findings in the second case as governing the first case. It would be useless to remand the first case for findings. *People v. Ramey*, 174 Colo. 250, 483 P.2d 374 (1971).

Applied in *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972); *People v. District Court*, 196 Colo. 401, 586 P.2d 31 (1978); *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979); *People v. Hillyard*, 197 Colo. 83, 589 P.2d 939 (1979); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *People v. Lindsey*, 660 P.2d 502 (Colo. 1983); *People v. Cobbin*, 692 P.2d 1069 (Colo. 1984); *People v. Lingo*, 806 P.2d 949 (Colo. 1991); *People v. Washington*, 865 P.2d 145 (Colo. 1994); *People v. Reyes*, 956 P.2d 1254 (Colo. 1998); *People v. Legler*, 969 P.2d 691 (Colo. 1998); *People v. Holmes*, 981 P.2d 168 (Colo. 1999); *People v. Winpigler*, 8 P.3d 439 (Colo. 1999); *People v. Crippen*, 223 P.3d 114 (Colo. 2010).

Rule 4.2. Interlocutory Appeals in Civil Cases

(a) Discretionary Interlocutory Appeals. Upon certification by the trial court, or stipulation of all parties, the court of appeals may, in its discretion, allow an interlocutory appeal of an order in a civil action. This rule applies only to cases governed by C.R.S. 13-4-102.1.

(b) Grounds for Granting Interlocutory Appeal. Grounds for certifying and allowing an interlocutory appeal are:

(1) Where immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and

(2) The order involves a controlling and unresolved question of law. For purposes of this rule, an "unresolved question of law" is a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court.

(c) Procedure in the Trial Court. The party seeking to appeal shall move for certification or submit a stipulation signed by all parties within 14 days after the date of the order to be appealed, stating that the appeal is not being sought for purposes of delay. The trial court may, in its discretion, certify an order as immediately appealable, but if all parties stipulate, the trial court must forthwith certify the order. Denial of a motion for certification is not appealable.

(d) Procedure in the Appellate Court. If the trial court certifies an order for an interlocutory appeal, the party seeking an appeal shall file a petition to appeal with the clerk of the court of appeals with an advisory copy served on the clerk of the trial court within 14 days of the date of the trial court's certification.

(1) **Docketing of Petition and Fees; Form of Papers.** Upon the filing of a petition to appeal, appellant shall pay to the clerk of the court of appeals the applicable docket fee. All papers filed under this rule shall comply with C.A.R. 32.

(2) **Number of Copies to be Filed and Served.** An original and five copies of any petition or brief shall be filed. One set of supporting documents shall be filed. If the court grants the petition to appeal, the appellant shall file an additional five copies of supporting documents no later than the date on which any reply is due.

(3) Content of Papers and Service.

(A) The petition shall contain a caption that complies with C.A.R. 3(d)(1) and C.A.R. 32.

(B) To enable the court to determine whether the petition should be granted, the petition shall disclose in sufficient detail the following:

- (i) The identities of all parties and their status in the proceeding below;
- (ii) The order being appealed;
- (iii) The reasons why immediate review may promote a more orderly disposition or establish a final disposition of the litigation and why the order involves a controlling and unresolved question of law;
- (iv) The issues presented;
- (v) The facts necessary to understand the issues presented;
- (vi) Argument and points of authority explaining why the petition to appeal should be granted and why the relief requested should be granted; and
- (vii) A list of supporting documents, or an explanation of why supporting documents are not available.

(C) The petition shall include the names, addresses, email addresses and telephone and fax numbers, if any, of all parties to the proceeding below; or, if a party is represented by counsel, the attorney's name, address, email address and telephone and fax numbers.

(D) The petition shall be served upon each party and the court below.

(4) **Supporting Documents.** A petition shall be accompanied by a separate, indexed set of available supporting documents adequate to permit review. Some or all of the following documents may be necessary:

- (A) The order being appealed;
- (B) Documents and exhibits submitted in the proceeding below that are necessary for a complete understanding of the issues presented;
- (C) A transcript of the proceeding leading to the order below.

(5) **No Initial Response to Petition Allowed.** Unless requested by the court of appeals, no response to the petition shall be filed prior to the court's determination of whether to grant or deny the petition.

(6) **Briefs.** If the court grants the petition to appeal, the petition to appeal shall serve as appellant's opening brief. The appellee shall file an answer brief and the appellant may file a reply brief according to a briefing schedule established by the court in its order granting the petition to appeal. The petition and briefs shall comply with the limitations on length contained in C.A.R. 28(g).

(7) **Oral Argument.** Oral argument is governed by C.A.R. 34.

(8) **Petition for Rehearing.** In all proceedings under this Rule 4.2, where the court of appeals has issued an opinion on the merits of the interlocutory appeal, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

(e) **Stay of Trial Court Proceedings.**

(1) The filing of a petition under this rule does not stay any proceeding below or the running of any applicable time limit. If the appellant seeks temporary stay pending the court's determination of whether to grant the petition to appeal, a stay ordinarily shall be sought in the first instance from the trial court. If a request for stay below is impracticable or not promptly ruled upon or is denied, the appellant may file a separate motion for temporary stay in the court of appeals supported by accompanying materials justifying the requested stay.

(2) An order granting the petition to appeal by the court of appeals automatically stays all proceedings below until final determination of the interlocutory appeal in the court of appeals unless the court, sua sponte, or upon motion lifts such stay in whole or in part.

(f) **Effect of Failure to Seek or Denial of Interlocutory Review.** Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal from entry of the final judgment.

(g) **Supreme Court Review.** Denial of a petition to appeal is not subject to certiorari review. A decision of the court of appeals on the merits shall be subject to certiorari review. No provision of this rule limits the jurisdiction of the Supreme Court under C.A.R. 21.

(h) All matters in the Court of Appeals under this rule shall be heard and determined by a special or regular division of three judges as assigned by the Chief Judge.

Source: Entire rule added and effective January 13, 2011; (c) and IP(d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Interlocutory resolution would not promote a more orderly disposition. Where plaintiff petitioned for interlocutory review of district court's order that economic loss rule barred plaintiff's other claims against defendants, immediate review would not have avoided a trial.

Therefore, interlocutory resolution of the economic loss question would not promote a more orderly disposition of the litigation. *Wahrman v. Golden W. Realty*, __ P.3d __ (Colo. App. 2011).

Rule 5. Entry of Appearance and Withdrawal

(a) **Entry of Appearance.** No attorney shall appear in any matter before the court until the attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; and (d) the attorney registration number.

(b) **Withdrawal.** An attorney may withdraw from a case only upon order of court. Such approval shall rest in the sound discretion of the court, and shall not be granted until the attorney seeking to withdraw has made reasonable efforts to give actual notice to the client:

- (1) That the attorney wishes to withdraw;
- (2) That the court retains jurisdiction;
- (3) That the client has the burden of keeping the court informed where notices, pleadings or other papers may be served;
- (4) That the client has the obligation to prepare for all appellate proceedings, or secure other counsel to so prepare;
- (5) That if the client fails or refuses to meet these burdens, the court may impose appropriate sanctions;
- (6) Of the dates of any proceedings and that the holding of such proceedings will not be affected by the withdrawal of counsel;
- (7) If the client is not a natural person, that it must be represented by counsel in any appellate proceeding unless it is a closely held entity and first complies with section 13-1-127, C.R.S.;

(8) That process may be served upon the client at his last known address; and

(9) Of the client's right to object within 14 days of the date of the notice.

(c) **Written Notification Certificate.** The attorney seeking to withdraw shall prepare a notification certificate stating that the above notification requirements have been met and the manner by which such notification was given to the client, and setting forth the client's last known address and telephone number. The notification certificate shall be filed with the court and a copy mailed to the client and all other parties. The client and opposing counsel shall have 14 days prior to entry of an order permitting withdrawal or such lesser time as the court may permit within which to file objections to the withdrawal. After order permitting withdrawal, the client shall be notified by the withdrawing attorney of the effective date of the withdrawal and all pleadings, notices or other papers may be served on the party directly by mail at the last known address of the party until new counsel enters an appearance.

(d) **Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics.** The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or

clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

Source: Entire rule added August 30, 1985, effective January 1, 1986; (b)(2) amended and effective April 7, 1994; (b) amended and effective April 5, 2010; (b)(9) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 6. No Colorado Rule

Rule 7. Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the trial court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of \$250 unless the trial court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the appellate court may direct if the judgment is modified. If a bond or equivalent security in the sum or value of \$250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the trial court objections to the form of the bond or to the sufficiency of the surety. The provisions of C.A.R. 8(b) apply to a surety upon a bond given pursuant to this Rule.

ANNOTATION

Law reviews. For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

An indigent plaintiff may be allowed to proceed on appeal under this rule without payment of a cost bond. In re Delahoussaye, 924 P.2d 1210 (Colo. App. 1996).

This rule does not apply to an appeal filed directly from an administrative agency. For

the purposes of this rule, an administrative hearing is not a "civil case". Anheuser Busch, Inc. v. Indus. Claim Appeals Office, 28 P.3d 969 (Colo. App. 2001).

Applied in Caldwell v. Armstrong, 642 P.2d 47 (Colo. App. 1981).

Rule 8. Stay or Injunction Pending Appeal

(a) **Stay Must Ordinarily be Sought in the First Instance in Trial Court; Motion for Stay in Appellate Court.** Application for a stay of the judgment or order of a trial court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court or to a judge or justice thereof, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge or justice of the court.

(b) **Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.** Relief available in the appellate court under this Rule may be conditioned upon the filing

of a bond or other appropriate security in the trial court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribed may be served on the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

(c) **When Bond Not Required.** The appellate court may, in its discretion, dispense with or limit the amount of bond when the appellant is an executor, administrator, conservator, or guardian of an estate and has given sufficient bond as such. The state, the county commissioners of the various counties, cities, towns, and school districts and all charitable, educational, and reformatory institutions under the patronage or control of the state and all public officials when suing or defending in their official capacities for the benefit of the public shall not be required to furnish bond.

(d) **Bond; Release of Lien or of Notice of Lis Pendens.** If a judgment for the payment of money has been made a lien upon real estate, when a bond is given such lien shall be released thereby. The clerk of the court wherein stay has been granted shall issue a certificate that the judgment has been stayed, and such certificate may be recorded with the recorder of the county in which such real estate is situated. Such certificate may also be served upon any officer holding an execution and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from which it was issued together with the copy of the certificate served upon him and shall set forth in his return what he has done under the execution.

Cross references: For stay of proceedings to enforce a judgment, see C.R.C.P. 62.

ANNOTATION

- I. General Consideration.
- II. Application for Stay or Injunction.
- III. Bond; Sureties; When Bond Not Required.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mtn. L. Rev. 618 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "Some Observations on Colorado Appellate Practice", see 34 Dicta 363 (1957).

This rule must be observed, and the supreme court will grant the application for supersedeas only after compliance with the rule. *Alsup v. Alsup*, 76 Colo. 260, 230 P. 796 (1924).

Trial court's jurisdiction usually lost upon perfection of appeal. Under normal appellate procedures a trial court loses its jurisdiction over a case as soon as an appeal is perfected in an appellate court. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

But jurisdiction reinvested upon appellate court's decision. When an appellate court announces its decision to affirm, reverse, remand, or modify then a trial court is automatically reinvested with jurisdiction. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

No power to stay writ of habeas corpus. A court has no power to stay proceedings upon an order of discharge of a prisoner upon a writ of habeas corpus. *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958).

Court does not pass upon plaintiff's claim that the stay order was improperly entered when he did not formally protest that order by filing either a notice of appeal under C.A.R. 4 or a motion under this rule. *DiMarco v. Dept. of Rev., MVD*, 857 P.2d 1349 (Colo. App. 1993).

Although a habeas corpus proceeding is a civil action, this rule and Rule 62, C.R.C.P., do not apply, and stays of execution are not appropriate in such a proceeding. *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958).

Applied in *Bernstein v. Goldberg*, 81 Colo. 39, 253 P. 477 (1927); *Shotking v. Atchison, T. & S.F.R.R.*, 124 Colo. 141, 235 P.2d 990 (1951); *Williams v. Guaranty Nat'l Ins. Co.*, 152 Colo. 457, 382 P.2d 802 (1963).

II. APPLICATION FOR STAY OR INJUNCTION.

"Supersedeas" defined. Supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up on appeal for review. *Monks v. Hemphill*, 119 Colo. 378, 203 P.2d 503 (1949).

Appeal may be had without supersedeas. The appeal and supersedeas are two separate things, and the appeal can be sustained without a supersedeas. *Monks v. Hemphill*, 119 Colo. 378, 203 P.2d 503 (1949).

But stay of execution must be sought by supersedeas. Where a stay of execution is desired by appellant, such relief must be sought by application for supersedeas. *Alden Sign Co. v. Roblee*, 119 Colo. 409, 203 P.2d 915 (1949).

Record must be complete before supersedeas will be granted. While the record must be complete before an application for supersedeas will be granted, in a case involving many parties and many causes of action and counterclaims, if it is complete so far as concerns those controversies in which error is assigned, it will be sufficient. *Murray v. Stuart*, 77 Colo. 167, 234 P. 1113 (1925).

Supersedeas not granted until application made therefor. Whether or not a supersedeas should be granted will not be considered until an application is made for the writ. *Ward v. Ward*, 89 Colo. 396, 3 P.2d 415 (1931).

Trial court may issue a stay either before or after a notice of appeal is filed. *Odd Fellows Bldg. & Inv. Co. v. City of Englewood*, 667 P.2d 1358 (Colo. 1983).

To determine whether to stay an order denying or granting an injunction, a court must consider four factors: (1) Whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Romero v. City of Fountain*, __ P.3d __ (Colo. App. 2011).

The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury a plaintiff will suffer absent the stay. More of one excuses less of the other. *Romero v. City of Fountain*, __ P.3d __ (Colo. App. 2011).

Supersedeas not granted to stay execution for costs. Where a supersedeas would serve

only to stay an execution for costs application for the writ will be denied. *Hunter v. Stapleton*, 77 Colo. 456, 236 P. 1013 (1925).

Stay of proceedings ordered. *Zaharia v. County Court ex rel. County of Jefferson*, 673 P.2d 378 (Colo. App. 1983).

III. BOND; SURETIES; WHEN BOND NOT REQUIRED.

Law reviews. For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

Trial court erred in entering an order staying all proceedings relative to enforcement of family support order without requiring appellant to file supersedeas bond. *Muck v. Arapahoe County Dist. Court*, 814 P.2d 869 (Colo. 1991).

Charitable institution may execute supersedeas bond as principal. *Buchhalter v. Solomon*, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Bond in form of cost bond not within rule. A bond in the form prescribed by § 13-16-101 for a cost bond is not a supersedeas bond and is not within this rule. *Fifer v. Fifer*, 120 Colo. 10, 206 P.2d 336 (1949).

Sureties subject themselves to judgment. In entering into the bond the sureties agreed, in effect, to abide by the law permitting the entry of judgment. *Buchhalter v. Solomon*, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Burden to show cause why the execution should not issue. In a proceeding by scire facias to obtain execution upon a judgment on a supersedeas bond, the burden is upon the surety to show cause why the execution should not issue. *Bosworth v. Garwood*, 79 Colo. 391, 246 P. 555 (1926).

Corporation held not under patronage or control of state. *Buchhalter v. Solomon*, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Rule 8.1. Stays in Criminal Cases

(a) Stay of Execution.

(1) **Death.** A sentence of death shall be stayed upon the filing of a notice of appeal.

(2) **Imprisonment.** A sentence of imprisonment shall be stayed if a notice of appeal is filed and a defendant elects not to commence service of the sentence or is admitted to bail. The sentencing court shall, upon written notice of the defendant for a stay and stating that he intends to seek review, stay a sentence of imprisonment but for not more than sixty days if the defendant is not admitted to bail.

(3) **Fine.** A sentence to pay a fine or a fine and costs may be stayed by the trial court upon such terms as the court deems proper if a notice of appeal is filed. The court may require the defendant to deposit the whole or any part of the fine and costs in the registry of the trial court or to give bond for the payment thereof, or to submit to an examination

of assets, and it may make an appropriate order to restrain the defendant from dissipating his assets.

(4) **Probation.** An order placing the defendant on probation shall remain in effect pending review by an appellate court unless the court grants a stay of probation.

(b) **Bail.** Admission to bail pending the determination of review as provided in Rule 46, Crim. P.

(c) **Application for Relief Pending Review.** If an application is made to an appellate court, or justice or judge thereof, for bail pending review or for an extension of time for filing the record or for any other relief which might have been granted by the trial court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the lower court action on the application did not afford the relief to which the applicant considers himself entitled.

Source: (a)(4) amended and effective January 26, 1995.

ANNOTATION

Defendant who elects not to commence service of his sentence cannot receive credit for time spent in jail pending disposition of an appeal. *People v. Scott*, 176 Colo. 86, 489 P.2d 198 (1971). See *People v. Falgout*, 176 Colo. 94, 489 P.2d 195 (1971).

Once the choice has been made, the defendant is bound by his election not to commence service of his sentence. *People v. Scott*, 176 Colo. 86, 489 P.2d 198 (1971).

Once probationary period has expired and an order terminating defendant's probation is entered, the prosecution cannot rely on the notice of appeal filed by defendant at the start of the probationary period as grounds that defendant's probation was stayed and that he never commenced his probation. *People v. Chesnick*, 797 P.2d 812 (Colo. App. 1990).

Subsection 8.1 (a)(4) automatically stays a probation order when a notice of appeal is filed, and the trial court lacked jurisdiction to revoke defendant's probation. Defendant did not waive the right to a stay of the probation order by participating in the probation program. *People v. Taylor*, 876 P.2d 130 (Colo. App. 1994) (decided prior to 1995 amendment to subsection (a)(4)).

No automatic stay of probation order pending appeal. Under subsection (a)(4) of this rule, as amended, the trial court retains jurisdiction to modify and terminate probation during the pendency of an appeal. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

Applied in *People v. District Court*, 191 Colo. 558, 554 P.2d 1105 (1976).

Rule 9. Release in Criminal Cases

(a) **Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction.** An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. An appellate court, or justice or judge thereof, may order the release of the appellant pending the appeal.

(b) **Release Pending Appeal from a Judgment of Conviction.** Application for release after a judgment of conviction shall be made in the first instance in the trial court. If the trial court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to an appellate court, or justice or judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. An appellate court, or justice or judge thereof, may order the release of the appellant pending disposition of the motion.

ANNOTATION

The trial court retains jurisdiction to grant or deny an appeal bond even after the defendant has filed a notice of appeal. The trial court retains jurisdiction to act with respect to matters that are not relative to or do not affect the order or judgment on appeal. Since the

granting or denial of an appeal bond has no impact or bearing upon the underlying conviction or related issues pending on appeal, the trial court retains jurisdiction. *People v. Stewart*, 26 P.3d 17 (Colo. App. 2000), rev'd on other grounds, 55 P.3d 107 (Colo. 2002).

Rule 10. Record on Appeal**(a) Composition of the Record on Appeal.**

(1) The final pleadings which frame the issues in the trial court; the findings of fact, conclusions of law and judgment; the judgment entered upon any jury verdict, the jury verdict, and answers by the jury to any special interrogatories; motions for new trial and other post-trial motions, if any, and the trial court's ruling; together with any other documents which by designation of either party or by stipulation are directed to be included shall constitute the record on appeal in all cases.

(2) The reporter's transcript, or such parts thereof as provided under section (b) of this rule and relevant depositions and exhibits may be made a part of the record.

(3) The records and files of the court shall be certified by the clerk of court.

(4) Unless the record is transmitted in electronic form pursuant to C.A.R. 11(b)(4), the original papers shall be in the record submitted. Except on written request by a party, the trial court need not duplicate or retain a copy of the papers or exhibits included in the record. The party requesting that a duplicate be retained shall advance the cost of preparing the copies.

(5) Unless the record is transmitted in electronic form pursuant to C.A.R. 11(b)(4), the record shall be properly paginated and fully indexed and shall be prepared and bound under the direction of the clerk of the court.

Comment: This Rule 10(a) supersedes an earlier version adopted on July 7, 1983, also effective January 1, 1984, in connection with the change to letter-size paper. The revised rule calls for an abbreviated record, formally eliminated folio references and limits the requirement of the trial court having to duplicate the record to only those instances where a duplicate is requested and paid for by a party.

(b) Record of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Record is Ordered; Costs. Within 14 days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and with the clerk of the appellate court in which the notice of appeal has been filed either: (1) A statement that no portions of the record other than those numerated in section (a) are desired or (2) a detailed designation of record, setting forth specifically those portions of the record to be included and all dates of proceedings for which transcripts are requested and the name(s) of the court reporter(s) who reported the proceedings which the appellant directs to be included in the record. The appellant shall serve a copy of the designation of record on each court reporter listed therein. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall include in the designation of record a description of the part of the transcript which the appellant intends to include in the record and a statement of the issues to be presented on appeal. If the appellee deems to be necessary a transcript of other proceedings, or other parts of the record, the appellee shall, within 14 days after the service of the statement or the appellant's designation of the record, file with the trial court and the appellate court and serve on the appellant and on any court reporter who reported proceedings of which the appellee desires additional transcript a designation of additional items to be included. Service on any court reporter of the appellant's designation of record or the appellee's additional designation of record shall

constitute a request for transcription of the specified proceedings. Within 14 days after service of any such designation of record, each such court reporter shall provide in writing to all counsel and pro se parties in the appeal: (1) the estimated number of pages to be transcribed; (2) the estimated completion date; and (3) the estimated cost of transcription. Within 21 days after receiving the reporter's estimate, the designating party shall deposit the full amount of such estimate with the court reporter. For good cause shown, within said 21 days and upon the agreement of the court reporter, the trial court may order a payment schedule extending the time for payment. When the cost of the transcription will be paid by public funds, the public entity shall make arrangements with the court reporter for payment of the transcription costs. Within 28 days of transmittal of the court reporter's cost estimate to the pro se party or counsel, the court reporter shall file with the trial court and the appellate court a statement of: (1) The date the court reporter's estimate was provided and the date on which the reporter received full payment of the estimate, or (2) the schedule of payments approved by the trial court under a good cause extension, or (3) that the cost of the transcript will be paid from public funds. Each party shall advance the cost of preparing and transmitting to the appellate court that part of the record designated by such party, except as otherwise ordered by the trial court for good cause shown.

Comment: Title changed to clarify that scope of subpart (b) is broader than just the transcript.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 14 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included by the clerk of the trial court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in section (a) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the appellate court as the record on appeal and transmitted thereto by the clerk of the trial court within the time provided by Rule 11.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

Source: Amended and effective June 18, 1992; (a)(2) and (b) amended and adopted October 30, 1997, effective January 1, 1998; (a)(3) and (b) amended and adopted April 27, 1998, effective July 1, 1998; (a)(4) and (a)(5) amended and effective September 7, 2006; (b) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For transmission of transcript to appellate court, see C.A.R. 11; for inclusion of cost of reporter's transcript in taxable costs of appeal, see C.A.R. 39.

ANNOTATION

- I. General Consideration.
- II. Composition of Record.
 - A. In General.
 - B. Judgment.
 - C. Reporter's Transcript.
 - D. Alternatives to Transcript; Agreed Statement.
- III. Correction or Modification of Record.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mtn. L. Rev. 618 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "Some Observations on Colorado Appellate Practice", see 34 Dicta 363 (1957). For note, "Colorado Appellate Procedure", see 40 U. Colo. L. Rev. 551 (1968). For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J.1 (1980).

This rule is not inherently constitutionally invalid. *Almarez v. Carpenter*, 347 F. Supp. 597 (D. Colo. 1972).

Intent of this rule, in dealing with the preparation of transcripts, is to insure that the appellate court will be given sufficient information to arrive at a just and reasoned decision. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978); *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994).

For three-part test to determine whether a new trial is warranted as relief for an inadequate or missing court record, see *Knoll v. Allstate Fire & Cas. Ins.*, 216 P.3d 615 (Colo. App. 2009).

Trial court to supervise preparation of record. The intention of this rule is that the trial court shall supervise the preparation of the record on appeal as designated by the party seeking same. *Cont'l Air Lines v. City & County of Denver*, 129 Colo. 1, 266 P.2d 400 (1954).

Appellant must overcome adverse judgment by record. A judgment entered by a court of general jurisdiction is presumed to be correct. A litigant suffering an adverse judgment has the burden of overcoming this presumption, and the supreme court must look to the record alone to determine whether the trial court acted properly in the premises. *Laessig v. May D & F*, 157 Colo. 260, 402 P.2d 183 (1965).

Appellant's duty to obtain record. The party prosecuting an appeal shall do any and all things necessary under this rule to obtain the record on appeal. *Cont'l Air Lines v. City & County of Denver*, 129 Colo. 1, 266 P.2d 400 (1954).

It is the appellant's duty to designate portions of record he deems necessary for appeal, and to see that the record is transmitted, and the appel-

lant will not be permitted to take advantage of his own failure to designate the pertinent portions of the transcript as part of the record on appeal. *Till v. People*, 196 Colo. 126, 581 P.2d 299 (1978); *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

It is the responsibility of an appellant to designate the record on appeal or such parts thereof as he deems necessary for his appeal and to ensure that the record is transmitted to the appellate court. *People v. Velarde*, 200 Colo. 374, 616 P.2d 104 (1980); *People v. Rollins*, 759 P.2d 816 (Colo. App. 1988).

Duty rests upon counsel to present a complete record in cases brought to the supreme court. *Nutter v. Wright*, 132 Colo. 304, 287 P.2d 655 (1955).

Appeal subject to dismissal for failure to comply with rule. Where a record on review fails to conform with this rule, the appeal may be dismissed either on motion or the court's own initiative. *Williams v. Williams*, 110 Colo. 473, 135 P.2d 1016 (1943); *George W. Clayton Coll. v. District Court*, 110 Colo. 365, 135 P.2d 138 (1943).

A reviewing court may of its own motion dismiss a proceeding where the record is confused or incomplete. *Hinshaw v. Dyer*, 166 Colo. 394, 443 P.2d 992 (1968).

But court has discretion to pass on questions presented. Although a record on appeal may not comply with this rule, the supreme court may, in its discretion, elect to pass upon questions presented in order that further delay and expense to the parties may be avoided. *Williams v. Williams*, 110 Colo. 473, 135 P.2d 1016 (1943).

Appellant who does not correctly anticipate appellee's and court's conceptions of what should be included in a record should not forfeit his case. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

Presumption that trial court's findings are supported by evidence. An appellate court must presume that the trial court's findings and conclusions are supported by the evidence where the appellant has failed to provide a complete record on appeal. *People v. Morgan*, 199 Colo. 237, 606 P.2d 1296 (1980); *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

Where no transcript of evidence considered by lower court is made part of record on appeal and there is no showing to contrary, an appellate court must presume that findings are supported by evidence presented to and considered by court. *People v. Gallegos*, 179 Colo. 211, 499 P.2d 315 (1972).

Where the record does not contain any of the trial court's instructions, a reviewing court will presume that an instruction given by the trial court correctly and clearly stated the law and

that defendant's objection is that the evidence does not support the giving of the instruction. *Nunn v. People*, 177 Colo. 87, 493 P.2d 6 (1972).

Claim not raised in trial court will not be considered on appeal. *Cnty. Mgt. Ass'n v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973).

An issue not before the trial court in the motion for new trial will not be considered on appeal. *Cady v. City of Arvada*, 31 Colo. App. 85, 499 P.2d 1203 (1972).

Ineffective assistance of counsel claim procedurally barred where appellant failed to specially designate on appeal any and all exhibits that were necessary to a resolution of the claim. *Bunton v. Atherton*, 613 F.3d 973 (10th Cir. 2010).

Defendant cannot bottom error upon occurrence in a portion of the trial which he has specifically agreed is not to be reported, for there is no way for an appellate court to review the alleged error. *Taylor v. People*, 176 Colo. 316, 490 P.2d 292 (1971).

Issue must be raised by parties, not "amicus curiae". Where issue is not raised by parties to appeal, but is raised in brief of "amicus curiae" issue will not be considered by appellate court. *Eugene Cervi & Co. v. Russell*, 31 Colo. App. 525, 506 P.2d 748 (1972), *aff'd*, 184 Colo. 282, 519 P.2d 1189 (1974).

Error cannot be asserted on prosecution's evidence alone. Where upon trial court's denial of defendant's motion for acquittal at close of people's case, defendant proceeds to offer evidence warranting submission of case to jury, defendant cannot assert error on people's evidence alone. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Applied in *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959); *Hinshaw v. Dept. of Welfare*, 157 Colo. 447, 403 P.2d 206 (1965); *Schroeder v. Bd. of County Comm'rs*, 152 Colo. 313, 381 P.2d 820 (1963); *Threadgill v. Capra*, 161 Colo. 453, 423 P.2d 318 (1967); *In re People in Interest of A.R.S.*, 31 Colo. App. 268, 502 P.2d 92 (1972); *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975); *Tucker v. Shoemaker*, 190 Colo. 267, 546 P.2d 951 (1976); *Lemier v. Real Estate Comm'n*, 38 Colo. App. 489, 558 P.2d 591 (1976); *C.M. v. People in Interest of J.M.*, 198 Colo. 436, 601 P.2d 1364 (1979); *Augustin v. Barnes*, 626 P.2d 625 (Colo. 1981); *In re Edison*, 637 P.2d 362 (Colo. 1981).

II. COMPOSITION OF RECORD.

A. In General.

Purpose of the notice of appeal is to require the clerk of the court in which the judgment

complained of is entered to certify the record for review. *Hull v. Denver Tramway Corp.*, 97 Colo. 523, 50 P.2d 791 (1935); *Wheeler Kelly Hagny Trust Co. v. Williamson*, 111 Colo. 515, 143 P.2d 685 (1943).

This rule retains a vestige of the bill of exceptions procedure not contained in the federal rules, for section (a) requires certification of the reporter's transcript by the trial judge, but Federal Rule of Appellate Procedure 10(a) has no such requirement. *Almarez v. Carpenter*, 347 F. Supp. 597 (D. Colo. 1972).

The right to an appeal is not denied by the absence of written findings of fact or conclusions of law in the record. Neither C.R.C.P. 52(a) nor this rule, requires written findings of fact and conclusions of law. *Dunbar v. District Court*, 131 Colo. 483, 283 P.2d 182 (1955).

Trial court's findings held adequate for purpose of appellate review. *In re People in Interest of D.S.*, 31 Colo. App. 300, 502 P.2d 95 (1972).

No requirement that appellate record be all inclusive. This rule does not require that every folio with any conceivable relationship to an issue raised on appeal be designated as part of the appellate record. Rather, this rule gives the appellant the discretion to determine what is necessary, and the appellant himself may, if it appears he has not included enough, supplement the record; or an appellee who feels that the designated record is lacking in some essential respect may file and serve on the appellant a designation of additional parts of the record to be included. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

Certification of the record is an official act of the inferior tribunal. *Civil Serv. Comm'n v. Doyle*, 174 Colo. 149, 483 P.2d 380 (1971).

And is not necessarily contingent upon certification of the transcript of the proceedings by a certified shorthand reporter. *Civil Serv. Comm'n v. Doyle*, 174 Colo. 149, 483 P.2d 380 (1971).

Judicial notice may generally not be taken of municipal ordinances or resolutions, and thus, it is a party's responsibility to introduce into the record copies of municipal ordinances or resolutions on which reliance is placed. *Concrete Contractors v. City of Arvada*, 621 P.2d 320 (Colo. 1981).

Where the district court considered the provisions of a city's charter, a municipal ordinance, and a municipal resolution in reaching its decision, the court of appeals abused its discretion in failing to ensure that those provisions of municipal law were made a part of the record in the case. *Concrete Contractors v. City of Arvada*, 621 P.2d 320 (Colo. 1981).

B. Judgment.

"Judgment" construed. To constitute a judgment there must be an express adjudication

to that effect, but, subject to the requirements of statute or court rule or practice, no particular form or verbal formula is required in a court proceeding to render its order a judgment, provided the rights of the parties may be ascertained therefrom. *Jones v. Galbasini*, 134 Colo. 64, 299 P.2d 503 (1956).

Inclusion of the judgment in the record is mandatory. *J. & R. A. Savageau, Inc. v. Larsen*, 117 Colo. 229, 185 P.2d 1012 (1947); *Horlbeck v. Walther*, 131 Colo. 36, 279 P.2d 434 (1955); *French v. Haarhues*, 132 Colo. 261, 287 P.2d 278 (1955); *Nutter v. Wright*, 132 Colo. 304, 287 P.2d 655 (1955); *Abbott v. Poynter*, 153 Colo. 147, 385 P.2d 120 (1963).

Failure to include judgment requires dismissal. Without a compliance with this rule requiring the inclusion of the judgment in the record, there is nothing for this court to review; consequently, an order of dismissal should be entered. *J. & R. A. Savageau, Inc. v. Larsen*, 117 Colo. 229, 185 P.2d 1012 (1947); *Horlbeck v. Walther*, 131 Colo. 36, 279 P.2d 434 (1955).

Unless a final judgment appears in the record, the appeal will be dismissed. *Sutley v. Davis*, 131 Colo. 75, 279 P.2d 848 (1955); *French v. Haarhues*, 132 Colo. 261, 287 P.2d 278 (1955); *Nutter v. Wright*, 132 Colo. 304, 287 P.2d 655 (1955).

Where the record did not disclose any final judgment entered in the court below in violation of this rule, there was nothing presented for review. *Howard v. Am. Law Book Co.*, 121 Colo. 5, 212 P.2d 1006 (1949).

Litigant has duty to ensure record contains proper judgment. The entry of judgment upon the court's order is a ministerial duty of the clerk, but if a litigant desires a review on appeal, it is his duty to see that the record on appeal is properly prepared and contains a final judgment; otherwise dismissal will follow. *French v. Haarhues*, 132 Colo. 216, 287 P.2d 278 (1955); *Nutter v. Wright*, 132 Colo. 304, 287 P.2d 655 (1955).

It is the duty of one who seeks review in the supreme court to see to it that an actual judgment has been pronounced by the trial court and entered by the clerk and that such judgment appears in the record on appeal. *Jones v. Galbasini*, 134 Colo. 64, 299 P.2d 503 (1956); *Abbott v. Poynter*, 153 Colo. 147, 385 P.2d 120 (1963).

Ruling is not substitute for judgment. A ruling by the trial court at the close of plaintiff's evidence granting a motion to dismiss and dispensing with the motion for new trial does not rise to the dignity of a judgment, and its inclusion in the record is not a substitute for the requirement of this rule that the record must include the judgment to be reviewed. *Jones v. Galbasini*, 134 Colo. 64, 299 P.2d 503 (1956); *Abbott v. Poynter*, 153 Colo. 147, 385 P.2d 120 (1963).

Where the designation of record on error requests that the record include the judgment entered and the direction for entry of the same judgment, the record contains the "order and judgment" and the order to the clerk of the court for entry of judgment, and this rule requires no more. *Flournoy v. McComas*, 175 Colo. 526, 488 P.2d 1104 (1971).

C. Reporter's Transcript.

Compliance with rule imperative. Compliance with the rules in the preparation, certification, and lodging of the transcript is imperative if it is desired to make it a part of the record on appeal. *Freeman v. Cross*, 134 Colo. 437, 305 P.2d 759 (1957).

Transcript is not an absolute necessity in the reviewing court. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

Because it is only part of record. The reporter's transcript is not the record on appeal, but only a part thereof. *Cont'l Air Lines v. City & County of Denver*, 129 Colo. 1, 266 P.2d 400 (1954).

Transcript is not, by definition, a writ, process, or proceeding. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

Only relevant portions of the trial proceedings need be included in the record, as may be necessary to present the issues on appeal. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970); *Alvarez v. Carpenter*, 347 F. Supp. 597 (D. Colo. 1972).

Transcript must be certified by the judge. *Hudson v. Am. Founders Life Ins. Co.*, 151 Colo. 54, 377 P.2d 391 (1962).

Authentication is judicial act. In the authentication of the full transcript, the trial judge acts as a judge under the solemnity of his official oath, and is presumed to have faithfully and honestly performed his duty. *Hudson v. Am. Founders Life Ins. Co.*, 151 Colo. 54, 377 P.2d 391 (1962).

It is presumed that a court acts under the solemnity of its oath in determining the authenticity of the transcript. *Churning v. Staples*, 628 P.2d 180 (Colo. App. 1981).

When certified transcript considered true. A transcript of the record as originally prepared by the reporter which is authenticated by a certificate signed by the trial judge, and transmitted to the supreme court under the seal of the clerk of the trial court, is to be considered true as if the parties had agreed to it. *Hudson v. Am. Founders Life Ins. Co.*, 151 Colo. 54, 377 P.2d 391 (1962).

Imperfection in a reporter's transcript cannot be cured by guesswork or by indulging in inferences or presumptions. *Hinshaw v. Dyer*, 166 Colo. 394, 443 P.2d 992 (1968).

Uncertified transcript of evidence filed with reviewing court is not properly before it.

Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

Uncertified transcript stricken. Rechnitz v. Rechnitz, 135 Colo. 165, 309 P.2d 200 (1957).

Lacking transcript, support of findings presumed. There being no reporter's transcript properly before the supreme court for consideration due to untimely filing, the regularity of the judgment and support of the findings of fact by the evidence must be presumed. Bonham v. City of Aurora, 133 Colo. 276, 294 P.2d 267 (1956).

Where a transcript of the evidence not filed pursuant to this rule cannot be considered because of the trial judge's justifiable refusal to certify it, the regularity of the judgment and support of it in evidence must be presumed. Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

In the absence of a transcript, the supreme court is bound to presume that the findings and conclusions of the trial court are correct and that the evidence presented supports the judgment. Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970); Furer v. Allied Steel Co., 174 Colo. 171, 483 P.2d 212 (1971).

Unless there is before the supreme court a certified transcript of the proceedings, the supreme court is unable to state that the trial court abused its discretion or that it was arbitrary and capricious. Rechnitz v. Rechnitz, 135 Colo. 165, 309 P.2d 200 (1957).

Where there is no transcript before the court on appeal, the regularity of the trial court's judgment and the competency of the evidence upon which that judgment is based must be presumed. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Where no transcript is provided on appeal the court must look to the record alone to determine whether the trial court acted properly. Statements made in the briefs of litigants cannot supply that which must appear in a certified record. Loomis v. Seely, 677 P.2d 400 (Colo. App. 1983).

Reconstruction of the record in the trial court is not appropriate when the precise language of the testimony is critical. People v. Killpack, 793 P.2d 642 (Colo. App. 1990).

Where defendant's argument on appeal is ascertainable from the existing record and the record is sufficient for appellate review, a complete transcript is unnecessary for purposes of reconstructing the record for one of the days during trial. People v. Jackson, 98 P.3d 940 (Colo. App. 2004).

The statements of counsel may not substitute for that which must appear of record. Subsequent Injury Fund v. Gallegos, 746 P.2d 71 (Colo. App. 1987).

Litigant must make his own arrangements with the reporter if he desires a transcript.

Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Transcript fees may not be waived by court. The preparation of a transcript by a reporter of his notes is a service which is not covered by his salary. Hence, the fees for such service are not payable to the court and the court cannot waive them. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Free transcript need not be provided when the furnishing of a transcript would be a vain and useless gesture. Snively v. Shannon, 182 Colo. 223, 511 P.2d 905 (1973).

Since the provisions of subsections (c) and (d) provide for a constitutionally permissible alternative method of proceeding on appeal where no reporter's transcript is available, there is no deprivation of due process or equal protection because indigents cannot obtain a cost-free reporter's transcript. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

And denial does not preclude appellate remedy. The denial of a request for a free transcript does not deny an indigent litigant any appellate remedy. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Or deny constitutional right. By virtue of the waiver of costs provided by § 13-16-103, and the alternative methods of furnishing a trial court record provided by this rule, courts of justice, both trial and appellate, are "open" and available to the indigent litigant, and there is no denial of any constitutional right embraced within the language or interpretation of § 6 of art. II, Colo. Const. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

D. Alternatives to Transcript; Agreed Statement.

Reporter's transcript is not only means provided by sections (a) through (e) of this rule for preserving and presenting to the appellate courts alleged error involving evidentiary or factual issues. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Requirements in circumstances in which stenographic transcript unavailable. Appellant must prepare a statement from recollection that is first submitted to trial court for approval. If it is necessary to add to record parts of evidence or proceedings that were not recorded by the reporter, the provisions of section (c) must be followed. Where there was no compliance with this rule, the appellate court has an inadequate basis to evaluate the parties' claims and the trial court's ruling. Halliburton v. Pub. Serv. Co., 804 P.2d 213 (Colo. App. 1990); In re McSoud, 131 P.3d 1208 (Colo. App. 2006); Knoll v. Allstate Fire & Cas. Ins., 216 P.3d 619 (Colo. App. 2009).

Nothing in section (c) prohibits a trial court from using its own notes or recollection

in record reconstruction. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

The trial court in doing so in an impartial manner eliminates any need for the trial judge to testify before a different judge regarding the reconstruction to maintain impartiality. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

Duty to follow procedures of this rule if no transcript available. An appellant is required to take the necessary steps to provide an adequate record for review. In those circumstances in which a stenographic transcript is not available, section (c) provides that the appellant should prepare a statement of the evidence or proceedings from the best available means, serve the statement upon opposing counsel for comments and changes, and then submit the final statement to the trial court for settlement, approval, and inclusion in the record on appeal. In the event the parties are unable to reach agreement concerning the contents of this statement, section (d) provides a mechanism for resolution of these differences. *People v. Conley*, 804 P.2d 240 (Colo. App. 1990).

Sections (c), (d), and (e) were promulgated specifically to reduce the cost of appellate review to the litigants and to conserve review time by the court itself. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970); *Alvarez v. Carpenter*, 347 F. Supp. 597 (D. Colo. 1972).

Section (e) of this rule insures adequate consideration of any issue involving evidentiary or factual material. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

Statements made in briefs insufficient to establish record. Statements made in briefs of litigants cannot supply what must appear from a certified record or an agreed statement. *Laessig v. May D & F*, 157 Colo. 260, 402 P.2d 183 (1965); *Hinshaw v. Dyer*, 166 Colo. 394, 443 P.2d 992 (1968); *McCall v. Meyers*, 94 P.3d 1271 (Colo. App. 2004).

Although this rule does not on its face apply to appellate review of an administrative agency decision, the underlying principle is applicable to such review. *Earl v. District Court*, 719 P.2d 321 (Colo. 1986); *Schaffer v. District Court*, 719 P.2d 1088 (Colo. 1986).

III. CORRECTION OR MODIFICATION OF RECORD.

Certification to the transcript of the proceedings is final. *Hudson v. Am. Founders Life Ins. Co.*, 151 Colo. 54, 377 P.2d 391 (1962).

This is true where the objectors produced no evidence or sworn testimony contradicting the transcript as finally certified and approved by the trial judge during the lengthy hearing on their objections. *Hudson v. Am. Founders Life Ins. Co.*, 151 Colo. 54, 377 P.2d 391 (1962).

Inaccuracies in certified transcript were not prejudicial. Although each of 98 inaccuracies in the certified transcript does alter the particular sentence somewhat, reviewing all of the changes elicited at the evidentiary hearing before the trial court, the supreme court concluded that reasonable men, considering the transcript in its entirety, would be compelled to find that the content of the transcript is not materially altered. Since this evidence showed no errors of any substance and since appellee did not show that the corrected record was in any manner false or untrue, he was not prejudiced by the changes and the transcript is a fair and accurate record of the civil service commission's proceedings which may be reviewed. *Civil Serv. Comm'n v. Doyle*, 174 Colo. 149, 483 P.2d 380 (1971).

Although the juvenile court was not the proper forum to resolve a motion to narrow the record on appeal which had been designated pursuant to this rule, any error arising from the limitation imposed by the trial court was, under the circumstances, harmless error. *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994).

Nothing in the plain language of this rule precludes an appellate court from considering a motion to correct a misstatement in the record after an opinion has been announced. It was reasonable for the trial court to correct the record and an injustice would occur here if an appeal were decided on the basis of an incorrect record. *People v. Wolfe*, 9 P.3d 1137 (Colo. App. 1999).

Court rejected defendant's argument that People's attempt to correct the record was barred by doctrine of laches and waiver. Trial court properly concluded that the interest in finality of the opinion was outweighed by the importance of ensuring an accurate result on appeal. *People v. Wolfe*, 9 P.3d 1137 (Colo. App. 1999).

Rule 10.1. Court of Appeals Accelerated Docket Procedure — Civil Appeals

Repealed September 23, 1983, effective January 1, 1984.

Rule 11. Transmission of Record

(a) Time for Transmission; Duty of Appellant; 91 Days (13 weeks) to Transmit. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 91 days (13 weeks) after the filing of the notice of appeal unless the time is shortened or extended by an order entered under section (d) of the Rule. After filing the notice of appeal the appellant shall comply with the provisions of C.A.R. 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of C.A.R. 10(b) and this section (a), and a single record shall be transmitted within 91 days (13 weeks) after the filing of the final notice of appeal.

Comment: This change increases the time for transmitting of the record to 91 days (13 weeks) and provides due date for the record filing to be tied with the date the notice of appeal is filed. The appellate court will not need to set this due date.

(b) Duty of Clerk to Transmit the Record.

(1) When the record, including any designated transcript, is complete for purposes of the appeal, the clerk of the trial court shall transmit the record to the clerk of the appellate court.

(2) The clerk of the trial court shall number the documents comprising the entire designated record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness.

(3) Documents of unusual bulk or weight and physical exhibits other than documents which are designated by the parties, shall not be transmitted by the clerk unless directed to do so by the clerk of the appellate court. The designating party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(4) Where the record is maintained in electronic form by the trial court, or can be made available in electronic form by the trial court, the clerk of the trial court is authorized to transmit the record electronically in accordance with procedures established by the appellate court.

(5) Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the appellate court. The clerk of the trial court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the appellate court.

(c) Temporary Retention of Record in Trial Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of sections (a) and (b) of this Rule, the parties may stipulate, or the trial court on motion of any party may order, that the clerk of the trial court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of C.A.R. 12(a) and by presenting to the clerk of the appellate court a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the trial court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The appellate court for good cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted. Any request for extension of the period of time based upon the reporter's inability to complete the transcript shall be supported by an affidavit of the reporter specifying why the transcript has not yet been prepared, the date by which the transcript can be completed, and a statement by the court reporter that all payments due have been made. Failure to pay for the transcript in accordance with C.A.R. 10(b) is

grounds for denial of a motion for extension. The appellate court may direct the trial court to expedite the preparation and transmittal of the record on appeal and, upon motion or sua sponte, take other appropriate action regarding preparation and completion of the record.

Comment: This rule removes from the trial court the authority to extend the time to transmit the record. The initial time for transmission of the record is set at 91 days (13 weeks) because trial courts appeared to require that amount of time on almost every case. The change should eliminate excess paperwork by attorneys and the court.

(e) Retention of the Record in the Trial Court by Order of Court. The appellate court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the trial court for use there pending the appeal, the trial court may make an order to that effect, and the clerk of the trial court shall retain the record or parts thereof subject to the request of the appellate court, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the trial court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties that Parts of the Record Be Retained in the Trial Court. The parties may agree by written stipulation filed in the trial court that designated parts of the record shall be retained in the trial court unless thereafter the appellate court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Appellate Court. If prior to the time the record is transmitted a party desires to make in the appellate court a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the trial court at the request of any party shall transmit to the appellate court such parts of the original record as any party shall designate.

Source: (b) and (d) amended and adopted April 27, 1998, effective July 1, 1998; (b) amended and effective September 7, 2006; (a), (a) comment, and (d) comment amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

- I. General Consideration.
- II. Transmission of Record.
- III. Enlargement of Time.

Applied in *People v. Boivin*, 632 P.2d 1038 (Colo. App. 1981).

II. TRANSMISSION OF RECORD.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

Supreme court requires strict compliance with this rule providing the time within which a reporter's transcript must be lodged. *Cox v. Adams*, 171 Colo. 37, 464 P.2d 513 (1970).

Compliance with the rules in the preparation, certification and lodging of the reporter's transcript is imperative if it is desired to make it a part of the record on error. *Smith v. Woodall*, 129 Colo. 435, 270 P.2d 746 (1954).

This rule must be interpreted to give it a practical effect. *Pueblo v. Mace*, 130 Colo. 162, 273 P.2d 1015 (1954).

Duties of appellant in appellate and trial courts. A litigant desiring a review of his case upon appeal is confronted with the accomplishment of two projects: One in the supreme court and the other in the trial court. In the supreme court he must make certain that the notice of appeal is timely filed and that his record on appeal is filed within the time prescribed by this rule, or such enlargement thereof as may be fixed. In the trial court, where preparation of the record on appeal is under the jurisdiction of the trial court in manner as provided by C.A.R. 10, he must see to it that the reporter's transcript, if he desires that it be included in the record on appeal, is prepared and lodged within the time fixed thereby by said C.A.R. 10 and this rule, or within such extended period as may be

granted by appropriate court order. *Cont'l Air Lines v. City & County of Denver*, 129 Colo. 1, 266 P.2d 400 (1954).

Appellant's duty to designate portions of record he deems necessary for appeal, and to see that the record is transmitted, and the appellant will not be permitted to take advantage of his own failure to designate the pertinent portions of the transcript as part of the record on appeal. *Till v. People*, 196 Colo. 126, 581 P.2d 299 (1978).

Transcript may not be filed only when "convenient". Transcripts, like briefs, may not be filed whenever or wherever counsel may find it convenient. *Smith v. Woodall*, 129 Colo. 435, 270 P.2d 746 (1954); *Freeman v. Cross*, 134 Colo. 437, 305 P.2d 759 (1957).

Transcript stricken for inexcusable delay in transmission. *Cont'l Air Lines v. City & County of Denver*, 129 Colo. 1, 266 P.2d 400 (1954); *Freeman v. Cross*, 134 Colo. 437, 305 P.2d 759 (1957); *Furer v. Allied Steel Co.*, 174 Colo. 171, 483 P.2d 212 (1971).

Where transcript of testimony is not certified to either the court of appeals or to the supreme court, the findings made by the trial court are binding upon the supreme court. *Hobbs v. Smith*, 177 Colo. 299, 493 P.2d 1352 (1972).

III. ENLARGEMENT OF TIME.

Petition to show cause does not stay time to proceed. The filing of a petition to show cause in the supreme court within a 10-day period following entry of final judgment, coupled with the filing of a motion in a trial court to suspend proceedings, does not stay the time to file a motion for a new trial under Rule 59, C.R.C.P., or stay the time to proceed under

C.A.R. 4 and this rule. *Walter v. Walter*, 136 Colo. 405, 318 P.2d 221 (1957) (decided prior to 1983 amendment).

Enlargement of time primarily a function of the trial court. While the supreme court has the inherent power to enlarge the time within which a reporter's transcript may be lodged, this function lies primarily and especially within the province and jurisdiction of the trial court. *Smith v. Woodall*, 129 Colo. 435, 270 P.2d 746 (1954) (decided prior to 1983 amendment).

Granting of extension rests in discretion of court. The granting of an extension of the period allowed under section (a) of this rule for the filing of a reporter's transcript rests within the sound discretion of the trial court, and the action taken will not be disturbed on review in the absence of a clear showing of abuse of that discretion. *Mitchell v. Espinosa*, 125 Colo. 267, 243 P.2d 412 (1952) (decided prior to 1983 amendment).

Effective date of final judgment in the trial court does not terminate the authority of the judge of that court. This rule extends the authority of the trial court to order extensions of time. *King v. Williams*, 131 Colo. 286, 281 P.2d 163 (1955) (decided prior to 1983 amendment).

Failure to apply for enlargement under C.R.C.P. 6 rarely excusable. Under C.R.C.P. 6(b)(1), enlargements of time are so readily obtainable where application is made therefor within apt time that there is rarely an occasion where failure to do so would appear to be excusable. *Smith v. Woodall*, 129 Colo. 435, 270 P.2d 746 (1954).

The press of work or other activities of an attorney does not constitute excusable neglect. *Cox v. Adams*, 171 Colo. 37, 464 P.2d 513 (1970); *Laugesen v. Witkins Homes, Inc.*, 29 Colo. App. 58, 479 P.2d 289 (1970).

Rule 12. Docketing the Appeal and Fees; Proceedings in Forma Pauperis; Filing of the Record

(a) Docketing the Appeal; Fees of Clerk. At the time of the filing of the notice of appeal or the time of filing any documents with an appellate court before the filing of the notice of appeal, the appellant shall pay to the clerk of the appellate court the docket fee as required by section 13-4-112(1) and the clerk shall enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal on the docket at the written request of that party. The party appealing shall docket the case as nearly as possible under the title given to the action in the trial court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title. Unless necessary to show the relationship of the parties, such caption shall not include the names of parties not involved in the appeal. The docket fee for an appellee as required by section 13-4-112(1) shall be paid upon the entry of appearance of the appellee. After an initial appellant or appellee has paid the docket fee, any additional appellants, appellees or cross-appellants entering an appearance by an attorney who is not already of record in the

case, shall also pay the docket fee as required by section 13-4-112(1). A cross-appellant shall pay the docket fee amount at the time the cross-appeal is filed. Extension of time shall not be granted for paying docket fees.

Comment: This revision calls for the payment of appellant's docket fee when the notice of appeal is filed, or, at the time of filing of the initial documents with the appellate court. It also eliminates designation of parties form.

(b) Leave to Proceed on Appeal in Forma Pauperis from Trial Court to Appellate Court. A party to an action in a trial court who desires to proceed on appeal in forma pauperis shall file in the trial court a motion for leave so to proceed, together with an affidavit showing an inability to pay fees and costs or to give security, a belief that the party is entitled to redress, and a statement of the issues which the party intends to present on appeal. If the motion is granted, the party may proceed without further application to the appellate court and without prepayment of fees or costs in either court or the giving of security. If the motion is denied, the trial court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the trial court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the trial court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the trial court shall state in writing the reasons for such certification or finding. A party proceeding under this subparagraph (b) shall attach a copy of the trial court's order granting or denying leave to proceed in forma pauperis in the trial court with the appendix to the notice of appeal.

(c) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings. A party to a proceeding before an administrative agency, board, commission, or officer who desires to proceed on appeal or review in the appellate court in forma pauperis shall file in the said court a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of section (a) of this Rule.

(d) Form of Briefs and Other Papers. Parties allowed to proceed in forma pauperis may file briefs and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(e) Filing of the Record. Upon receipt of the record or papers authorized to be filed in lieu of the record under the provisions of C.A.R. 11(c) and (g) following timely transmittal, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

Comment: This change is necessary because "docketing" has been eliminated.

(f) Deleted September 23, 1983, effective January 1, 1984.

Source: (a) amended August 30, 1985, effective January 1, 1986; (b) amended May 15, 1986, effective November 1, 1986; (a) and (e) amended and effective February 7, 2008.

Cross references: For current rule concerning dismissal for failure to timely docket, see C.A.R. 38(a); for waiver of costs incurred by poor persons, see § 13-16-103, C.R.S.

ANNOTATION

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mtn. L. Rev. 618 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For note, "Colorado Appellate Procedure", see 40 U. Colo. L.

Rev. 551 (1968). For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

Failure to comply with rule will cause dismissal. Where appellants fail to comply with this rule in that they do not file designation of

parties or pay docket fee within time fixed for transmission of record, failing to do so for approximately 90 days thereafter, where appellants fail to show good cause for noncompliance, where appellee moves for dismissal based thereon, and where 60-day extension of time for transmission of record has been granted, appeal will be dismissed. *Gonzales v. Petriken*, 31 Colo. App. 415, 502 P.2d 1110 (1972).

Failure to comply with rule may be waived by failure to file objection, but where sufficient and timely objection is made and there is no adequate excuse for failure to comply, it is an appellate court's duty to enforce this rule. *Gonzales v. Petriken*, 31 Colo. App. 415, 502 P.2d 1110 (1972).

Leave to proceed in forma pauperis granted. In re Petition of Griffin, 152 Colo. 347, 382 P.2d 202 (1963); In re Petition of Pigg, 152 Colo. 500, 384 P.2d 267 (1963).

Supreme court will not consider unintelligible petitions and motions which have no legal significance and which do not meet the requirements of established procedures in appellate practice, in view of the right of an indigent defendant to have counsel appointed to prosecute an appeal. In re Petition of Griffin, 152 Colo. 347, 382 P.2d 202 (1963).

Issue cannot be reviewed on appeal when the record does not contain a transcript of

the testimony taken in the trial court. *Buder v. Reynolds*, 175 Colo. 28, 486 P.2d 432 (1971).

When a reporter fails within 60 days to file a reporter's transcript or seek an extension of time, the trial court will order that the transcript be stricken from the record on error. *Buder v. Reynolds*, 175 Colo. 28, 486 P.2d 432 (1971).

Determination of indigency lies within the discretion of the trial court. A party who proceeded as an indigent in the trial court may proceed as an indigent on appeal without further authorization unless the court finds, in writing, that the party is no longer entitled to so proceed. The trial court may order the production of any documents or evidence it deems necessary to determine continuing indigency. *People in Interest of M.N.*, 950 P.2d 674 (Colo. App. 1997).

Because trial court had previously permitted defendant to proceed in forma pauperis on direct appeal, it was unnecessary for defendant to reapply to the trial court to proceed in forma pauperis on his motion for postconviction relief; thus trial court's failure to address defendant's motion to proceed in forma pauperis on appeal contemporaneously with his motion for postconviction relief was not error. *People v. Boyd*, 23 P.3d 1242 (Colo. App. 2001).

Applied in *Denbow v. District Court*, 652 P.2d 1065 (Colo. 1982).

Rules 13 to 20. No Colorado Rules

ORIGINAL JURISDICTION

Rule 21. Procedure in Original Actions

(a) Original Jurisdiction Under the Constitution.

(1) This rule applies only to the original jurisdiction of the Supreme Court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution and to the exercise of the Supreme Court's general superintending authority over all courts as provided in Section 2 of Article VI of the Colorado Constitution. Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the Supreme Court. Such relief shall be granted only when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available.

(2) Petitions to the Supreme Court in the nature of mandamus, certiorari, habeas corpus, quo warranto, injunction, prohibition and other forms of writs cognizable under the common law are subject to this rule. The petitioner need not designate a specific form of writ when seeking relief under this rule.

(b) **How Sought; Proposed Respondents.** Petitioner shall file a petition for a rule to show cause specifying the relief sought and shall request the court to issue to one or more proposed respondents a rule to show cause why the relief requested should not be granted. The proposed respondent should be the real party in interest.

(c) **Docketing of Petition and Fees; Form of Pleadings; Briefs.** Upon the filing of a petition for a rule to show cause, petitioner shall pay to the clerk of the Supreme Court the docket fee of \$225.00. All papers filed under this rule shall comply with C.A.R. 32.

(d) **Number of Copies to be Filed and Served.** An original and ten copies of each petition, motion, brief or other paper shall be filed. One set of supporting documents shall be filed. If the court issues a Rule to Show Cause, the Petitioner shall file an additional ten copies of supporting documents no later than the date on which any reply is due.

(e) Content of Pleadings and Service.

(1) The petition shall be titled, "In Re [Caption of Underlying Proceeding]." If there is no underlying proceeding, the petition shall be titled, "In Re [Petitioner v. Proposed Respondent]."

(2) Petitioner shall have the burden to show that a rule to show cause should be issued. To enable the court to determine whether a rule to show case should be issued, the petition shall disclose in sufficient detail the following:

(A) The identity of the petitioner and of the proposed respondent, together with their party status in the proceeding below (e.g., plaintiff, defendant, etc.);

(B) The identity of the court or other tribunal below, the case name and case number or other identification of the proceeding below, if any, and identification of any other related proceeding;

(C) The identity of the persons or entities against whom relief is sought;

(D) The ruling, action, or failure to act complained of and the relief being sought;

(E) The reasons why no other adequate remedy is available;

(F) The issues presented;

(G) The facts necessary to understand the issues presented;

(H) Argument and points of authority explaining why a rule to show cause should be issued and why relief requested should be granted; and

(I) A list of supporting documents, or an explanation of why supporting documents are not available.

(3) The petition shall include the names, addresses, and telephone and fax numbers, if any, of all parties to the proceeding below; or, if a party is represented by counsel, the attorney's name, address, and telephone and fax number.

(4) The petition shall be served upon each party and proposed respondent and the court or tribunal below.

(f) Supporting Documents. A petition shall be accompanied by a separate, indexed set of available supporting documents adequate to permit review. Some or all of the following documents may be necessary:

(1) The order or judgment from which relief is sought;

(2) Documents and exhibits submitted in the proceeding below that are necessary for a complete understanding of the issues presented;

(3) A transcript of the proceeding leading to the order or judgment below.

(g) Stay; Jurisdiction.

(1) The filing of a petition under this rule does not stay any proceeding below or the running of any applicable time limit. If the petitioner seeks a temporary stay in connection with the petition pending the court's determination whether to issue a rule to show cause, a stay ordinarily shall be sought in the first instance from the court or tribunal. If a request for stay below is impracticable or not promptly ruled upon or is denied, the petitioner may file a separate motion for a temporary stay in the Supreme Court supported by accompanying materials justifying the requested stay.

(2) Issuance of a rule to show cause by the Supreme Court automatically stays all proceedings below until final determination of the original proceeding in the Supreme Court unless the court, sua sponte, or upon motion, lifts such stay in whole or in part.

(h) No Initial Responsive Pleading to Petition Allowed. Unless requested by the Supreme Court, no responsive pleading to the petition shall be filed prior to the court's determination of whether to issue a rule to show cause.

(i) Denial; Rule to Show Cause.

(1) The court in its discretion may issue a rule to show cause or deny the petition without explanation and without an answer by any respondent.

(2) The clerk, by first class mail, shall serve the rule to show cause on all persons ordered or invited by the court to respond and shall provide copies to the judge or other officer in the proceeding below.

(j) Response to Rule to Show Cause.

(1) The court in its discretion may invite or order any person in the proceeding below to respond to the rule to show cause within a fixed time, and may invite amicus curiae participation. Any person in the proceedings below may request permission to respond to

the rule to show cause but may not respond unless invited or ordered to do so by the court. Those ordered by the court to respond are the respondent.

(2) The response to any order of the court shall conform to section (c) and (d) of this rule.

(3) Two or more respondents may answer jointly.

(k) **Reply to Response to Rule to Show Cause.** Petitioner may submit a reply brief within the time fixed by the court.

(l) **No Oral Argument.** There shall be no oral argument unless ordered by the court.

(m) **Opinion Discretionary.** The court, upon review, in its discretion may discharge the rule or make it absolute, in whole or in part, with or without opinion.

(n) **Petition for Rehearing.** In all proceedings under this Rule 21, where the Supreme Court has issued an opinion discharging a rule or making a rule absolute, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

Source: Entire rule repealed and readopted November 19, 1998, effective January 1, 1999; (d) amended and adopted June 27, 2002, effective July 1, 2002; (c) amended and adopted February 27, 2003, effective March 3, 2003.

Cross references: For relief available in the nature of remedial writs in the district court generally, see C.R.C.P. 106; for jurisdiction of supreme court to issue remedial and original writs in general, see § 3 of art. VI, Colo. Const.

ANNOTATION

I. General Consideration.

II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mtn. L. Rev. 618 (1951). For note, "Habeas Corpus in Colorado for the Convicted Criminal", see 30 Rocky Mt. L. Rev. 145 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For note, "Colorado Appellate Procedure", see 40 U. Colo. L. Rev. 551 (1968). For note, "Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19—the 'Procedural Phantom' Still Stalks in Colorado", see 46 U. Colo. L. Rev. 609 (1974-75). For comment, "Reporter's Privilege: Pankratz v. District Court", see 58 Den. L.J. 681 (1981). For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982). For article, "Original Proceedings in the Colorado Supreme Court", see 12 Colo. Law. 413 (1983).

Annotator's note. For other annotations concerning original jurisdiction of supreme court, see Const. Colo., art. VI, sec. 3.

Purpose of original proceedings. Original proceedings are authorized to test whether the trial court is proceeding without or in excess of its jurisdiction and to review a serious abuse of discretion where an appellate remedy would not be adequate. Margolis v. District Court, 638 P.2d 297 (Colo. 1981); People v. District Court,

Arapahoe County, 868 P.2d 400 (Colo. 1994); Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998); Kourlis v. District Court, 930 P.2d 1329 (Colo. 1997); Hawkinson v. Biddle, 880 P.2d 748 (Colo. 1994); Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

The general function of a writ of prohibition is to enjoin an excessive or improper assumption of jurisdiction. Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977).

An original proceeding is an appropriate way to challenge a district court ruling allegedly in excess of the court's jurisdiction. Chavez v. District Court, 648 P.2d 658 (Colo. 1982).

An original proceeding pursuant to this rule is not a substitute for an appeal and is limited to an inquiry into whether the trial court exceeded its jurisdiction or abused its discretion. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993); Lambdin v. District Ct. of Arapahoe Cty., 903 P.2d 1126 (Colo. 1995); Pearson v. District Court, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

An original proceeding is appropriate to prevent an excess of jurisdiction by a lower court when no other remedy would be adequate. Paul v. People, 105 P.3d 628 (Colo. 2005).

Original and remedial writs are the common-law writs. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

But present authority to entertain original and remedial writs is conferred by the constitution. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Colorado supreme court's original jurisdiction has its source in § 3 of art. VI, Colo.

Const.; its exercise is discretionary and governed by the circumstances of the case. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

C.R.C.P. 106 and this rule are to be construed together. *Soliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957).

Prohibition is not available where party has adequate remedies at law, or where it will supersede the functions of an appeal. *Fitzgerald v. District Court*, 177 Colo. 29, 493 P.2d 27 (1972).

Where a municipal court has jurisdiction over the defendants and the subject matter of the action, and an adequate remedy at law is available, original proceedings in prohibition will not be entertained. *Douglas v. Municipal Court*, 151 Colo. 358, 377 P.2d 738 (1963).

Court will not consider issues not presented below. The orderly administration of justice requires that parties first present all evidence and arguments to the trial court. Simply stated, the supreme court will not consider issues and evidence presented for the first time in original proceedings. *Panos Inv. Co. v. District Court*, 662 P.2d 180 (Colo. 1983).

Petitioner responsible for providing substantiating record. A petitioner seeking prohibition has the responsibility of providing the supreme court with a record that will substantiate the request for extraordinary relief. *Mitchell v. District Court ex rel. Eighth Judicial Dist.*, 672 P.2d 997 (Colo. 1983).

In the absence of a compelling need, this rule may not serve as a substitute for an adequate appellate remedy that a party simply fails to exercise. C.A.R. 3.4 provides adequate process for appellants to the court of appeals in dependency and neglect cases. *People ex rel. A.H.*, 216 P.3d 581 (Colo. 2009).

Original writ disfavored where appeal available. There is a general policy which disfavors the use of an original writ where an appeal would be an appropriate remedy. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

Absent a showing that appellate review would not afford adequate relief, relief by original proceedings is disfavored. *Coquina Oil Corp. v. District Court*, 623 P.2d 40 (Colo. 1981).

In contempt proceedings to enforce an order, the validity of the questioned order can be challenged and defendants will be afforded full opportunity to justify their failure or refusal to comply therewith. If, by any judgment entered by the trial court in those proceedings, the parties feel aggrieved, their remedy by appeal is speedy and altogether adequate for the protection of their rights, and there is no occasion for invoking the original jurisdiction of the supreme court. *Valas v. District Court*, 130 Colo. 21, 273 P.2d 1017 (1954); *Meaker v. District Court*, 134 Colo. 151, 300 P.2d 805 (1956).

But to be used where appeal inadequate. Where an appeal is not a plain, speedy, and adequate remedy, one may be entitled to an original writ of prohibition. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

A proceeding under this rule is appropriate to review a serious abuse of discretion where an appellate remedy would not be adequate. *Halliburton v. County Court ex rel. City & County of Denver*, 672 P.2d 1006 (Colo. 1983); *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316 (Colo. 1984).

Where the damage that may result from the court's abuse of discretion cannot be cured on appeal, mandamus will lie to ensure observance of the rules of civil procedure. *Tyler v. District Court*, 193 Colo. 31, 561 P.2d 1260 (1977).

Although the questions involved upon which the relief in original jurisdiction is asked may be reviewed on appeal, that is not conclusive against the right as to relief if in the judgment of the court, such remedies are not plain, speedy, and adequate. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902); *People ex rel. L'Abbe v. District Court*, 26 Colo. 386, 58 P. 604, 46 L.R.A. 850 (1899).

A writ in the nature of prohibition is an extraordinary remedy and should be granted only in cases where the party seeking relief does not have an adequate remedy on appeal. *Valas v. District Court*, 130 Colo. 21, 273 P.2d 1017 (1954); *Meaker v. District Court*, 134 Colo. 151, 300 P.2d 805 (1956).

Original proceedings are only applicable to those matters in which an adequate remedy is not available on appeal. *DeLong v. District Court*, 151 Colo. 364, 377 P.2d 737 (1963).

Original jurisdiction under this rule will be invoked where appellate remedies are inadequate. *People v. District Court*, 664 P.2d 247 (Colo. 1983); *Hawkinson v. Biddle*, 880 P.2d 748 (Colo. 1994); *Kourlis v. District Court, El Paso County*, 930 P.2d 1329 (Colo. 1997).

The exercise of original jurisdiction is appropriate where a pre-trial ruling will place a party at a significant disadvantage in litigating the merits of the controversy and conventional appellate remedies are inadequate. *Mitchell v. Wilmore*, 981 P.2d 172 (Colo. 1999).

A trial court's decision to vacate a jury-imposed death verdict is a matter of public importance invoking original jurisdiction. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Original jurisdiction may be exercised to entertain an interlocutory appeal that was improperly brought pursuant to another rule. *People v. Braunthal*, 31 P.3d 167 (Colo. 2001).

Prohibition is an appropriate remedy when the trial court has abused its discretion and where an appellate remedy would not be adequate and in this case the supreme court exer-

cised original jurisdiction to address issues of significance not yet examined. *City and County of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997).

Original jurisdiction is proper under this rule, prior to dismissal of the underlying action or appeal, on issue of sanctions. While the court of appeals is not without jurisdiction to determine the issue of propriety of sanctions issued by a settlement conference judge, the appellate remedy under such circumstances would not assist petitioner who is under order to comply or risk contempt. *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992).

Original jurisdiction under this rule is proper when appellate review of trial court's evidentiary ruling would not afford adequate relief since jeopardy will have attached and the defendant cannot be retried. *People v. District Court of El Paso County*, 869 P.2d 1281 (Colo. 1994).

Appeal held adequate remedy. The mere fact that a new trial may be necessary to correct an improper denial of a third-party complaint does not in itself render an appeal inadequate as a remedy for the third-party plaintiff. *Pub. Serv. Co. v. District Court*, 638 P.2d 772 (Colo. 1981).

Original writs cannot supersede the ordinary functions of an appeal. *People ex rel. City & County of Denver v. District Court*, 81 Colo. 163, 255 P. 447 (1927); *White v. District Court*, 695 P.2d 1133 (Colo. 1984).

Original proceedings may not be employed as a substitute for an appeal. *Douglas v. Municipal Court*, 151 Colo. 358, 377 P.2d 738 (1963); *DeLong v. District Court*, 151 Colo. 364, 377 P.2d 737 (1963); *Coquina Oil Corp. v. District Court*, 623 P.2d 40 (Colo. 1981).

Prohibition may not be used in lieu of an appeal. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958); *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958); *Town of Vail v. District Court*, 163 Colo. 305, 430 P.2d 477 (1967); *First Nat'l Bank v. District Court*, 164 Colo. 9, 432 P.2d 1 (1967); *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977); *Lincoln First Bank v. District Court*, 628 P.2d 615 (Colo. 1981).

Prohibition cannot be converted into, or made to serve the purpose of, an appeal, or writ of review to undo what already has been done. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958).

Original jurisdiction may not be utilized to avoid the requirements of finality of judgments and orders set forth in C.A.R. 1. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

Prohibition is preventive, rather than corrective, remedy, and usually issues only to prevent the commission of a future act, rather than to undo an act already performed. *People ex rel.*

Long v. District Court, 28 Colo. 161, 63 P. 321 (1900); *Stiger v. District Court*, 188 Colo. 407, 535 P.2d 508 (1975).

A writ of prohibition is designed to restrain rather than remedy an abuse of jurisdiction. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

The remedy of prohibition is primarily preventive or restraining, not corrective, and only incidentally remedial in the sense of giving relief to the parties. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958); *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958).

The office of the writ of prohibition is preventive in that it restrains excessive or improper assumption of jurisdiction by a tribunal possessing judicial or quasi-judicial powers. *City of Aurora v. Congregation Beth Medrosh Hagodol*, 140 Colo. 462, 345 P.2d 385 (1959).

Relief in the nature of prohibition is discretionary with the supreme court. *People ex rel. L'Abbe v. District Court*, 26 Colo. 386, 58 P. 604, 46 L.R.A. 850 (1899); *People ex rel. Bonfils v. District Court*, 29 Colo. 83, 66 P. 1068 (1901); *People ex rel. Barnum v. District Court*, 74 Colo. 48, 218 P. 912 (1923); *People ex rel. Zalinger v. County Court*, 77 Colo. 172, 235 P. 370 (1925); *Meaker v. District Court*, 134 Colo. 151, 300 P.2d 805 (1956); *Stull v. District Court*, 135 Colo. 86, 308 P.2d 1006 (1957); *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958); *City of Aurora v. Congregation Beth Medrosh Hagodol*, 140 Colo. 462, 345 P.2d 385 (1959); *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977); *Coquina Oil Corp. v. District Court*, 623 P.2d 40 (Colo. 1981); *White v. District Court*, 695 P.2d 1133 (Colo. 1984); *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992); *People v. District Court, Arapahoe County*, 868 P.2d 400 (Colo. 1994); *Pearson v. District Court*, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

It is a supervisory power. Prohibition is a power conferred by the constitution by means of which, when necessary, supervisory control may be exercised over inferior tribunals, acting without or in excess of their jurisdiction. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

And prohibition not granted unless the inferior court has no jurisdiction to act. *People ex rel. Barnum v. District Court*, 74 Colo. 48, 218 P. 912 (1923); *People ex rel. Zalinger v. County Court*, 77 Colo. 172, 235 P. 370 (1925); *People ex rel. City & County of Denver v. District Court*, 81 Colo. 163, 255 P. 447 (1927); *Stull v. District Court*, 135 Colo. 86, 308 P.2d 1006 (1957); *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980).

When prohibition proper remedy. Relief in the nature of prohibition is a proper remedy only in those cases where the district court is

proceeding without or in excess of its jurisdiction or has abused its discretion in exercising its functions. *City of Colo. Springs v. District Court*, 184 Colo. 177, 519 P.2d 325 (1974); *People v. Gallagher*, 194 Colo. 121, 570 P.2d 236 (1977); *Prudential Prop. & Cas. Ins. Co. of Am. v. District Court*, 617 P.2d 556 (Colo. 1980); *Lincoln First Bank v. District Court*, 628 P.2d 615 (Colo. 1981); *Marks v. District Court*, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982); *People v. District Court*, 825 P.2d 1000 (Colo. 1992); *Beckord v. District Court*, 698 P.2d 1323 (Colo. 1985); *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992).

Relief in the nature of prohibition is appropriate where the district court is proceeding without or in excess of its jurisdiction, or has abused its discretion. *Tyler v. District Court*, 193 Colo. 31, 561 P.2d 1260 (1977); *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

An aggrieved party may petition the supreme court for relief in the nature of prohibition when an inferior tribunal has allegedly exceeded its jurisdiction. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957).

An order in the nature of prohibition should be entertained where it is apparent that no judgment in favor of the plaintiff in the court below could be affirmed for want of jurisdiction over the person of the defendant. *Carlson v. District Court*, 116 Colo. 330, 180 P.2d 525 (1947); *Kellner v. District Court*, 127 Colo. 320, 256 P.2d 887 (1953).

Relief in the nature of prohibition in an original proceeding is proper where a trial court is proceeding, or threatens to proceed, without jurisdiction. *Andrews v. Lull*, 139 Colo. 536, 341 P.2d 475 (1959).

Although a district court may have jurisdiction of a case, prohibition still may lie upon a clear showing that the court has grossly abused its discretion and that an appeal would not provide an adequate remedy. *Western Food Plan, Inc. v. District Court*, 198 Colo. 251, 598 P.2d 1038 (1979).

Mandamus proper remedy where court has abused its discretion. Relief in the nature of mandamus under this rule is a proper remedy in a case in which a district court has abused its discretion in exercising its functions. *Gonzales v. District Court*, 198 Colo. 505, 602 P.2d 857 (1979).

A writ in the nature of mandamus will issue only upon a showing that the trial court has abused its discretion and that the damage sustained as a result of the abuse of discretion cannot be remedied on appeal. *Pub. Serv. Co. v. District Court*, 638 P.2d 772 (Colo. 1981).

The issuance of a writ to mandate the vacation of the reference order to a master is necessary to protect the rights of the petitioner where

the court is proceeding in excess of its power, for to await the final judgment based on the master's report would be too late, any appeal at that point a futile act, the expenditure of both time and money would already have occurred, and there would then be no way to undo what had already been erroneously done. *Gelfond v. District Court*, 180 Colo. 95, 504 P.2d 673 (1972).

Prohibition will not issue when the petitioner has failed to act with reasonable promptness. *James v. James*, 95 Colo. 1, 32 P.2d 821 (1934).

Nor where attention of lower court must be directed to jurisdiction question. Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction, since one summoned can appear specially in the court or quasi-judicial agency to move that process be quashed as to him. *City of Thornton v. Pub. Utils. Comm'n*, 154 Colo. 431, 391 P.2d 374 (1964).

The attention of the trial court must be called to any lack of jurisdiction before a writ of prohibition will issue from the supreme court. *Town of Vail v. District Court*, 163 Colo. 305, 430 P.2d 477 (1967); *LeGrange v. District Court*, 657 P.2d 454 (Colo. 1983).

Nor to prevent court from proceeding to final conclusion. Prohibition will not issue to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958); *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958); *Town of Vail v. District Court*, 163 Colo. 305, 430 P.2d 477 (1967); *First Nat'l Bank v. District Court*, 164 Colo. 9, 432 P.2d 1 (1967).

Nor to restrain court from error in case properly before it. Prohibition may never be used to restrain a trial court from committing error in deciding a question properly before it. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958); *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958); *Town of Vail v. District Court*, 163 Colo. 305, 430 P.2d 477 (1967); *First Nat'l Bank v. District Court*, 164 Colo. 9, 432 P.2d 1 (1967).

If an inferior court has jurisdiction of the subject, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy of prohibition; there must be excess of jurisdiction, and not mere error in the exercise of a conceded jurisdiction. *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958).

Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958).

A writ of prohibition does not correct mere error. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977); *Alspaugh v. District Court*, 190 Colo. 282, 545 P.2d 1362 (1976).

The writ of prohibition cannot be sued for appealing cases on the installment plan and it will not be issued on account of irregularities where the trial court had both jurisdiction of the subject matter and of the person of a defendant. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Questions on the merits of the case may be reviewed only by appeal; the supreme court will not use its constitutional supervisory power to prevent error in a trial court. *Toll v. City & County of Denver*, 139 Colo. 462, 340 P.2d 862 (1959).

And will not issue when lower court may properly and fully determine question. The supreme court will not exercise original jurisdiction when the question may be properly submitted and determined and the rights of the petitioner fully protected and enforced in the lower court. *Rogers v. Best*, 115 Colo. 245, 171 P.2d 769 (1946); *Kemper v. District Court*, 131 Colo. 325, 281 P.2d 512 (1955); *Medberry v. Patterson*, 174 F. Supp. 720 (D. Colo.), cert. denied, 358 U.S. 932, 79 S. Ct. 320, 3 L. Ed. 2d 304 (1959).

Review limited to questions of jurisdiction and abuse of discretion. Under this rule, the authority of the supreme court extends no further than to determine whether a trial court exceeds its jurisdiction or abuses its discretion. *Toll v. City & County of Denver*, 139 Colo. 462, 340 P.2d 862 (1959); *People v. Martinez*, 24 P.3d 629 (Colo. 2001).

When a writ of prohibition is presented to the supreme court, its only inquiry is whether the inferior judicial tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject matter and the parties, has exceeded its legitimate powers. *City of Aurora v. Congregation Beth Medrosh Hagodol*, 140 Colo. 462, 345 P.2d 385 (1959); *City of Colo. Springs v. District Court*, 184 Colo. 177, 519 P.2d 325 (1974).

And court may not adjudicate rights of non-parties. Where parties who enjoyed favorable ruling in a trial court are not parties in prohibition proceedings in the supreme court, the court is in no position to adjudicate their rights. *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958).

But court may prevent future proceedings or enter proper order. Where an unauthorized act of an inferior tribunal has been performed, and something remains to be done to give full effect to the judgment in a matter beyond the lower court's jurisdiction, prohibition may be granted to prevent such further action and also to undo what has already been done by directing the lower court to set aside its order and enter a

proper order. *People ex rel. Long v. District Court*, 28 Colo. 161, 63 P. 321 (1900).

When more than preventive relief available. Ordinarily, relief only lies to prevent the lower court from proceeding further with the cause, but where this would not give the relator the relief to which he is entitled, it may direct that all proceedings had in excess of jurisdiction be quashed and the order entered which should have been. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

Application must show prima facie circumstances justifying jurisdiction. A party seeking to invoke the original jurisdiction of the supreme court under this rule, must be able to show, prima facie at least, circumstances justifying the exercise of such jurisdiction. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

And failure to do so is fatal defect. The application to invoke original jurisdiction is fatally defective in that there is no allegation that sets forth the circumstances which rendered it necessary or proper that the supreme court exercise its original jurisdiction. *Rogers v. Best*, 115 Colo. 245, 171 P.2d 769 (1946); *Medberry v. Patterson*, 174 F. Supp. 720 (D. Colo.), cert. denied, 358 U.S. 932, 79 S. Ct. 320, 3 L. Ed. 2d 304 (1959).

Burden is on petitioner. In an original proceeding pursuant to this rule, the burden is on the petitioner to clearly establish that the respondent trial court is proceeding without or in excess of its jurisdiction, or has seriously abused its discretion. *Brewer v. District Court*, 655 P.2d 819 (Colo. 1982); *Miller v. District Court*, 737 P.2d 834 (Colo. 1987).

Lower court and judge are indispensable parties. In an application to the appellate tribunal for relief against an inferior court, the court and judge thereof are indispensable parties. *James v. James*, 95 Colo. 1, 32 P.2d 821 (1934).

In a proceeding seeking a writ of mandamus, the district court and the district court judge, acting in his capacity as judge, should be named as the appropriate respondents. *Wesson v. Bowling*, 199 Colo. 30, 604 P.2d 23 (1979).

No time limit on filing specified. This rule does not specify any time limit on filing. Application of the doctrine of laches may bar consideration of original proceedings by the supreme court; nevertheless, a three-month delay may not be unreasonable. *Nolan v. District Court*, 195 Colo. 6, 575 P.2d 9 (1978).

This rule tolls statutory speedy trial period. *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979); *People v. Beyette*, 711 P.2d 1263 (Colo. 1986).

Although proceeding not technically interlocutory appeal. Section 18-1-405 and Crim. P. 48 exclude, from the computation of the time in which a defendant shall be brought to trial the period of delay caused by an interlocutory ap-

peal, but an original proceeding under this rule is, technically speaking, not an interlocutory appeal. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

No authority for issuing writs of prohibition against attorney general. Although this rule provides for prohibition against district courts in appropriate circumstances, it expresses no authority for issuing such writs against the attorney general. *Western Food Plan, Inc. v. District Court*, 198 Colo. 251, 598 P.2d 1038 (1979).

Applied in *Berger v. People*, 123 Colo. 403, 231 P.2d 799, cert. denied, 342 U.S. 837, 77 S. Ct. 62, 96 L. Ed. 633 (1951); *Colo. State Bd. of Exam'rs of Architects v. District Court*, 126 Colo. 340, 249 P.2d 146 (1952); *Caldwell v. District Court*, 128 Colo. 498, 266 P.2d 771 (1953); *Farrell v. District Court*, 135 Colo. 329, 311 P.2d 410 (1957); *Garrimore v. Justice Court*, 143 Colo. 403, 355 P.2d 116 (1960); *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961); *Colo. State Council of Carpenters v. District Court*, 155 Colo. 54, 392 P.2d 601 (1964); *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970); *People ex rel. Heckers v. District Court*, 170 Colo. 533, 463 P.2d 310 (1970); *People ex rel. Dunbar v. District Court*, 180 Colo. 107, 502 P.2d 420 (1972); *City & County of Denver v. Juvenile Court*, 182 Colo. 157, 511 P.2d 898 (1973); *People v. Spencer*, 185 Colo. 377, 524 P.2d 1084 (1974); *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975); *City of Louisville v. District Court*, 190 Colo. 33, 543 P.2d 67 (1975); *Clinic Masters, Inc. v. District Court*, 192 Colo. 120, 556 P.2d 473 (1976); *Shon v. District Court*, 199 Colo. 90, 605 P.2d 472 (1980); *Barnes v. District Court*, 199 Colo. 310, 607 P.2d 1008 (1980); *Barker v. District Court*, 199 Colo. 416, 609 P.2d 628 (1980); *In re Henne*, 620 P.2d 62 (Colo. App. 1980); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *Sandefer v. District Court*, 635 P.2d 547 (Colo. 1981); *People v. Clerkin*, 638 P.2d 808 (Colo. App. 1981); *Cavanaugh v. State, Dept. of Soc. Servs.*, 644 P.2d 1 (Colo. 1982); *Continental Title Co. v. District Court*, 645 P.2d 1310 (Colo. 1982); *Pleasant v. Tihonovich*, 647 P.2d 236 (Colo. 1982); *Faris v. Rothenberg*, 648 P.2d 1089 (Colo. 1982); *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982); *Greenwell v. Gill*, 660 P.2d 1305 (Colo. App. 1982); *Pignatiello v. District Court*, 659 P.2d 683 (Colo. 1983); *People v. Smith*, 984 P.2d 50 (Colo. 1999); *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

II. ILLUSTRATIVE CASES.

Trial court found proceeding without jurisdiction. *Carlson v. District Court*, 116 Colo. 330, 180 P.2d 525 (1947); *Kellner v. District Court*, 127 Colo. 320, 256 P.2d 887 (1953);

Warwick v. District Court, 129 Colo. 300, 269 P.2d 704 (1954); *Stull v. District Court*, 135 Colo. 86, 308 P.2d 1006 (1957).

Question of constitutionality is matter to be raised by appeal, and not by a petition for prohibition. *Colo. State Bd. of Med. Exam'rs v. District Court*, 138 Colo. 227, 331 P.2d 502 (1958).

Supreme court's discharge of a rule to show cause improvidently granted has no substantive significance and does not indicate approval or disapproval of trial court ruling, and, thus, trial court erred in using such discharge as a basis for dismissing criminal charges against a defendant. *People v. McGraine*, 679 P.2d 1084 (Colo. 1984).

But prohibition proper to prevent prosecution barred by statute of limitations. An original proceeding in prohibition is proper to prevent a trial judge from proceeding with a prosecution on an indictment which showed on its face that the indictment had not been returned within the time fixed by statute, as a court may not proceed contrary to the inhibitions contained in the statute of limitations. *Markiewicz v. Black*, 138 Colo. 128, 330 P.2d 539, 75 A.L.R.2d 678 (1958).

Where a trial court is without jurisdiction to try defendant under an indictment showing on its face that prosecution is barred by the statute of limitations, prohibition is the proper remedy for relief. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Or to prevent double jeopardy. Where it appears that defendants were in jeopardy and that a court is about to place them in jeopardy a second time for the same offense, prohibition is the proper proceeding to protect defendants in their constitutional right against being twice put in jeopardy for the same offense. *Markiewicz v. Black*, 138 Colo. 128, 330 P.2d 539, 75 A.L.R.2d 678 (1958).

This rule is an appropriate method for a defendant to challenge an erroneous ruling on probable cause. Habeas corpus relief is generally not available unless other relief is unavailable. *Blevins v. Tihonovich*, 728 P.2d 732 (Colo. 1986).

This rule provides an appropriate procedural mechanism, absent any other adequate remedy, to mandate compliance by the department of corrections with trial court sentencing orders. *People v. Dixon*, 133 P.3d 1176 (Colo. 2006).

Original proceeding could have been filed to test preliminary hearing finding probable cause. *White v. MacFarlane*, 713 P.2d 366 (Colo. 1986).

Exercise of original jurisdiction proper to prevent confusion among prosecutors and uncertainty of defendants where pre-trial ruling declared death penalty statute to be

unconstitutional. *People v. Young*, 814 P.2d 834 (Colo. 1991).

Exercise of original jurisdiction proper to resolve question of juvenile court's authority to order department of institutions not to send youths to out-of-state facility. *McDonnell v. Juvenile Court*, 864 P.2d 565 (Colo. 1993).

Supreme court had original jurisdiction to determine whether trial court exceeded its jurisdiction or seriously abused its discretion in not allowing petitioner to proceed in forma pauperis. Magistrate's denial of motion did not constitute reversible error or prejudice to petitioner where magistrate determined petitioner's subsequent claims, and denied relief. *Hawkinson v. Biddle*, 880 P.2d 748 (Colo. 1994).

Exercise of jurisdiction under this rule proper to review trial court's ruling denying plaintiffs' request to proceed without filing cost bond since ruling had an obvious impact on the ability to litigate claims. *Walcott v. District Ct., 2nd Jud. Dist.*, 924 P.2d 163 (Colo. 1996).

Exercise of jurisdiction proper under this rule, where the trial court abused its discretion in discharging defendant from the department of corrections and where appeal would be inadequate to remedy defendant's immediate and improper release from the department. *People v. Miller*, 25 P.3d 1230 (Colo. 2000).

Exercise of original jurisdiction proper to address the district courts staying of an employee's Wage Claim Act claim against an employer pending conclusion of arbitration proceedings when appellate review of the arbiter's final decision would not have been an adequate remedy because the underlying issue of the right to pursue compensation through the Colorado court system would not be resolved. *Lambdin v. District Ct. of Arapahoe Cty.*, 903 P.2d 1126 (Colo. 1995).

Or where court lacks subject matter jurisdiction. Prohibition is applicable to restrain a trial court from proceeding with a criminal trial when it has no jurisdiction over the subject matter. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Or personal jurisdiction. Prohibition is the proper remedy to invoke in a civil action where a district court is proceeding without jurisdiction of the person of a defendant. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Where a court lacked jurisdiction to determine a party's right to custody in a habeas corpus proceeding, prohibition is a proper remedy to challenge a custody order from that court. *Lopez v. Smith*, 146 Colo. 180, 360 P.2d 967 (1961); *Brouwer v. District Court*, 169 Colo. 303, 455 P.2d 207 (1969).

Where an application is made to a licensing authority for a retail liquor license and the li-

cense is duly issued, the district court does not have jurisdiction to reverse the findings of the licensing authority and revoke the license in review proceedings if the licensee is not made a party. The petitioner-licensee, not being a party to the review proceedings, has no remedy by appeal and properly sought relief by invoking the original jurisdiction of the supreme court. *Short v. District Court*, 147 Colo. 52, 362 P.2d 406 (1961).

Writ of mandamus will issue to insure full observance with the rules of civil procedure. In a proper case, a writ of mandamus will issue to insure the full observance of the rules of civil procedure, and, in such a case, it must be shown that the damage to petitioner cannot be cured by appeal and that judicial discretion has been abused. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974).

Pretrial discovery may be proper subject for original writ. Matters relating to pretrial discovery are ordinarily within the trial court's discretion and are reviewable only by appeal rather than in an original proceeding; however, if it is shown that judicial discretion has been grossly abused and that damage to the petitioners could not be cured by appeal, an original writ in the nature of prohibition may issue. *Chicago Cutlery Co. v. District Court*, 194 Colo. 10, 568 P.2d 464 (1977).

When a procedural ruling will have a significant effect on a party's ability to litigate the merits of the controversy and the damage to a party could not be cured on appeal, an original proceeding is an appropriate remedy to challenge a trial court's order relating to matters of pretrial discovery. *Kerwin v. District Court*, 649 P.2d 1086 (Colo. 1982).

Although matters of pretrial discovery are ordinarily within the discretion of the trial court, they are not exempted from extraordinary relief under appropriate circumstances. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Although orders relating to pretrial discovery are interlocutory in nature and normally not reviewable in an original proceeding, the supreme court has not hesitated to exercise its original jurisdiction when a discovery order places a party at an unwarranted disadvantage in litigating the merits of his claim. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

Where the trial court's order both prevented the plaintiff from accessing the sole source of factual information for which she demonstrated substantial need and departed significantly from the court's precedent in mandating that plaintiff waive medical record privileges, the court properly exercised its jurisdiction. *Cardenas v. Jerath*, 180 P.3d 415 (Colo. 2008).

As may be denial of amendment of complaint. Denial of petitioner's motion to amend his complaint was a ruling justifying the supreme court's exercise of original jurisdiction.

Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

And pretrial rulings on issues involving admissibility of evidence and imposition of sanctions against prosecution in criminal cases are claims which are properly before the supreme court for a decision on the merits in an original proceeding. *People v. District Court*, 664 P.2d 247 (Colo. 1983); *People v. Casias*, 59 P.3d 853 (Colo. 2002).

Relief was appropriate under this rule where the trial court's ruling barring introduction of DNA evidence would impair the prosecution's ability to present its case and double jeopardy would bar a retrial if the defendant were acquitted. The supreme court held that the trial court erred in refusing to admit the DNA evidence and that exclusion of the evidence was an abuse of discretion. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

And reviewing an erroneous discovery order that could place an unnecessary burden on the prosecution that is not mandated by the rules. *People v. Vlassis*, 247 P.3d 196 (Colo. 2011).

And psychiatric examination ordered in violation of C.R.C.P. 35(a). Petitioner's allegations that respondent court exceeded its jurisdiction and abused its discretion by ordering a psychiatric examination in violation of C.R.C.P. 35(a) presented a proper case for exercise of the supreme court's original jurisdiction. Post-judgment appeal obviously cannot reverse the possible adverse consequences of a pretrial psychiatric examination of petitioner. *Tyler v. District Court*, 193 Colo. 31, 561 P.2d 1260 (1977).

And denial of intervention of right. In cases in which an order denies the right to intervene, situations may arise (e.g., where intervention is a matter of right) where the determination in the action may bind the intervenors and where the denial can be considered as a final order affecting the rights of the persons seeking to intervene. In such instances an order denying intervention may justify invoking the original jurisdiction of the supreme court to prevent a denial or miscarriage of justice. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

And improper consolidation of actions. Contention that district court had no power under § 38-22-111 (1) to consolidate one action which was pending with another action which had been dismissed without prejudice, and thus was proceeding without in personam jurisdiction, was a proper matter to be resolved in a proceeding for a writ of mandamus. *Columbia Sav. & Loan Ass'n v. District Court*, 186 Colo. 212, 526 P.2d 661 (1974).

And question of improper venue. The supreme court may consider the question of improper venue on an original writ in view of the importance of determining the question raised

and of preventing the delay and expense of a retrial. *Jameson v. District Court*, 115 Colo. 298, 172 P.2d 449 (1946); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

In an action on contract, it appearing that defendant was entitled to have the case tried in the county of his residence, relief is allowed against the trial in another county. *People ex rel. Barnum v. District Court*, 74 Colo. 121, 218 P. 1047 (1923).

And denial of dismissal for failure to grant speedy trial. Where a trial court has denied his motion for dismissal for failure to grant a speedy trial, a criminal defendant may seek a writ of prohibition. *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980).

Relief in the nature of prohibition under this rule is an appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

And protection of judgment lienor. An appeal following a trial on the merits may not be an adequate remedy for a judgment lienor whose priority might be destroyed by the sale of the encumbered property by a judgment creditor whose rights attached subsequent to the default judgment; thus, an original proceeding is proper. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

And review of order for temporary possession in condemnation proceeding. Because an order for temporary possession in a condemnation proceeding is interlocutory, and review must be by an original proceeding. *Larson v. Chase Pipe Line Co.*, 183 Colo. 76, 514 P.2d 1316 (1973).

And failure to provide transcript of preliminary hearing to indigent. Failure to provide a transcript of a preliminary hearing at the request of an indigent defendant in a criminal case, when the transcript is necessary for an effective defense, is an abuse of discretion by the district court and is subject to review by the supreme court on an original writ. *Gonzales v. District Court*, 198 Colo. 505, 602 P.2d 857 (1979).

And question of reasonableness of bail. The proper remedy to the question of the reasonableness of the amount set as bail is by way of original proceedings in the supreme court. *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965).

Supreme court has jurisdiction to review trial court's order on attorney fees for a court-appointed attorney as an independent original proceeding, but, if there is an appeal on some aspect of the underlying action, the attorney fees issue may be raised in such appeal without the necessity of bringing the indepen-

dent original proceeding. *Bye v. District Court*, 701 P.2d 56 (Colo. 1985).

Supreme court has jurisdiction to review controversy over sanctions, because it implicates entirely different legal theory than underlying action, is collateral to the merits of that action, and involves parties which are different than the parties to the underlying action. *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992).

But order granting intervention not reviewable on original writ. An order of a trial court granting intervention under C.R.C.P. 24 is not reviewable by the supreme court in an action invoking the court's original jurisdiction under this rule. *Groendyke Transp., Inc. v. District Court*, 140 Colo. 190, 343 P.2d 535 (1959).

Nor application to set aside default judgment. The only proper procedure to secure review of a trial court's order granting or denying an application to set aside a default judgment is by appeal after final judgment. *Weaver Constr. Co. v. District Court*, 190 Colo. 227, 545 P.2d 1042 (1976).

The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. *Stiger v. District Court*, 188 Colo. 407, 535 P.2d 508 (1975).

And prohibition not usable to limit hearing by regulatory commission. Where the jurisdiction of the public utilities commission was invoked by the utility when it filed its application, the commission scheduled a hearing, and notice was directed to be given to those whom the commission envisioned might be interested, the supreme court certainly cannot enjoin the hearing or direct the scope thereof in order to prevent error, nor can it limit the parties to whom notice should be given; thus, a petition for prohibition is premature. *City of Thornton v. Pub. Utils. Comm'n*, 154 Colo. 431, 391 P.2d 374 (1964).

Revocation of conditional plea agreement in criminal proceeding by district court, which retains jurisdiction over agreement at least until the express condition has been satisfied, goes beyond the scope of supreme court review cognizable under this rule. *White v. District Court*, 695 P.2d 1133 (Colo. 1984).

Supreme court has no original jurisdiction to issue a writ of prohibition against an independent regulatory commission like the public utilities commission. *Intermountain R.E.A. v. Pub. Utils. Comm'n*, 723 P.2d 142 (Colo. 1986).

Supreme court has jurisdiction to review a defendant's sentence if the trial court's sentence is illegal. *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Supreme court has jurisdiction to review the court of appeals' stay of the Colorado state

board of medical examiners' suspension of a doctor's license to practice medicine. *Bd. of Med. Exam'rs v. Court of Appeals*, 920 P.2d 807 (Colo. 1996).

Interlocutory review granted to address the propriety of the trial court's orders for mediation, where trial court ordered mediation despite petitioner's claims of physical and psychological abuse by husband and appellate review would not prevent the harm petitioner sought to avoid. *Pearson v. District Court*, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

Prohibition generally improper where new trial ordered. Relief in the nature of prohibition is not a proper remedy in cases where the trial court orders a new trial, unless the trial court's decision to grant or deny the new trial reflects a clear showing of an abuse of discretion. *People in Interest of P.N.*, 663 P.2d 253 (Colo. 1983).

Issuance of injunctive orders without complying with rules of civil procedure. *Stull v. District Court*, 135 Colo. 86, 308 P.2d 1006 (1957).

The court may set aside a lower court order allowing a person or entity to operate without a license when the lower tribunal has abused its discretion or acted outside of its jurisdiction to defeat exercise of the agency's authority delegated to it by the legislature. Due regard for the agency's role in carrying out the legislative design is at the heart of the court's inquiry in this regard. *Kourlis v. District Court*, El Paso County, 930 P.2d 1329 (Colo. 1997).

Rule to show cause issued why Boulder county district court should not grant the petitioners' motion for a change of venue and held that the district court erroneously denied the petitioners' motion for change of venue under C.R.C.P. 98 (b)(2). *Executive Dir. v. District Ct. for Boulder County*, 923 P.2d 885 (Colo. 1996).

Rule to show cause made absolute where district court issued case management order that required the trial to be set within 30 days; the date of issuance of the order extended the deadline for setting of trial by 30 days. *Becker v. District Ct. for Arapahoe County*, 969 P.2d 700 (Colo. 1998).

Rule to show cause made absolute where trial court refused plaintiffs' uncontested motions to postpone the deadline for disclosure of expert testimony and to continue the trial. Parties were in agreement to wait for the NTSB's plane crash investigative report instead of hiring expert investigators on short notice. *Burchett v. S. Denver Windustrial*, 42 P.3d 19 (Colo. 2002).

Given the liberal interpretation afforded to procedural rules, district court abused its discretion by dismissing petitioner's motion for transfer as untimely filed under C.R.C.P. 520(b) and appellate remedy would be inad-

equate. Accordingly, court makes the rule to show cause absolute and directs direct court to grant petitioner's motion for transfer to county

court. *Semental v. Denver County Court*, 978 P.2d 668 (Colo. 1999).

Rule 21.1. Certification of Questions of Law

(a) **Power to Answer.** The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or United States Court of Claims, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

(b) **Method of Invoking.** This Rule may be invoked by an order of any of the courts referred to in section (a) upon said court's own motion or upon the motion of any party to the cause.

(c) **Contents of Certification Order.** A certification order shall set forth:

- (1) The question of law to be answered; and
- (2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(d) **Preparation of Certification Order.** The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) **Costs of Certification.** Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) **Briefs and Argument.** Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his opening brief within 35 days from the date of receipt of the notice, and the opposing parties shall file an answer brief within 35 days from service upon him of copies of the opening brief. A reply brief may be filed within 21 days of the service of the answer brief. Briefs shall be in the manner and form of briefs as provided in C.A.R. 28. Oral arguments shall be as provided in C.A.R. 34.

(g) **Opinion.** The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

Source: (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Utilization of rule to obtain binding opinion from Colorado supreme court. See *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1973), *aff'd*, 523 F.2d In re A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1978); *Moore v. McFarlane*, 642 P.2d 496 (Colo. 1982).

Applied in *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975); *United States v. United Banks*, 542 F.2d 819 (10th Cir. 1976); *People v.*

District Court, 196 Colo. 401, 586 P.2d 31 (1978); *In re Question Concerning State Judicial Review*, 199 Colo. 463, 610 P.2d 1340 (1980); *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981); *Keller v. A.O. Smith Harvestore Prods.*, 819 P.2d 69 (Colo. 1991); *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003); *Hoery v. United States*, 64 P.3d 214 (Colo. 2003).

Rules 22 and 23. No Colorado Rules**Rule 24. Proceedings in Forma Pauperis**

(See C.A.R. 12(b).)

GENERAL PROVISIONS**Rule 25. Filing and Service**

(a) **Filing.** Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that (1) briefs shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized; and (2) a paper filed by an inmate confined to an institution shall be deemed filed when filed in accordance with C.A.R. 25(b). If a motion requests relief which may be granted by a single judge or justice, the judge or justice may permit the motion to be filed with him or her, in which event the judge or justice shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) **Inmate Filings.** A document filed by an inmate confined in an institution is timely filed with the court if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

(c) **Service of all Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(d) **Manner of Service.** Service may be personal or by mail or E-Service. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. E-Service is complete upon the time and date of transmission by the E-Service provider.

(e) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; (d) amended and effective February 7, 2008.

ANNOTATION

With respect to the service of process requirement of § 8-53-119 (3), service upon the attorney general constitutes service upon industrial commission (now industrial claim appeals

office). *Butkovich v. Indus. Comm'n*, 723 P.2d 1306 (Colo. 1985).

Applied in *re Lowery v. Indus. Comm'n*, 666 P.2d 562 (Colo. 1983).

Rule 26. Computation and Extension of Time

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these Rules the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted including holidays, Saturdays and Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in these Rules, "Legal holiday" includes the first day of January, observed as New Year's Day; the

third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) **Enlargement of Time.** The appellate court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal beyond that prescribed in C.A.R. 4(a). Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission, or officer of the State of Colorado, except as specifically authorized by law.

(c) **Repealed.**

Source: (a) amended and effective August 4, 1994; (a) amended and adopted June 27, 2002, effective July 1, 2002; (a) amended and effective and committee comment added and effective January 12, 2006; (a) amended and (c) repealed and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012.

COMMITTEE COMMENT

The rule as amended conforms to C.R.C.P. 6(a).

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

Time computation is sometimes "forward," meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting "back-

ward" means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

Law reviews. For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980). For article, "'Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines", see 41 Colo. Law. 33 (January 2012).

Appellate court cannot enlarge the time for filing notice of appeal in civil cases beyond that prescribed in Rule 4(a), C.A.R. Chap-

man v. Miller, 29 Colo. App. 8, 476 P.2d 763 (1970).

The provisions of section (b) of this rule prohibit an appellate court from enlarging the time for filing a notice of appeal under C.A.R. 4(a). People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973).

Filing appeal within time set by statute vests court of appeals with jurisdiction and the

court itself cannot enlarge time set by statute. *Denver v. Bd. of Assessment Appeals*, 748 P.2d 1306 (Colo. App. 1987).

New requirement that notice of appeal be filed with the appellate court is jurisdictional and strict compliance with the rule is required. Therefore, a notice of appeal erroneously filed in the trial court was of no effect under the new rules, and trial court was without authority to grant an extension of time to correctly file a notice of appeal. *Collins v. Boulder Urban Renewal Auth.*, 684 P.2d 952 (Colo. App. 1984).

But can enlarge time in criminal cases. An appellate court may, for good cause shown, enlarge the time for filing under C.A.R. (4)(a). *People v. Allen*, 182 Colo. 395, 513 P.2d 1060 (1973).

Although counsel's neglect in timely filing a notice of appeal is inexcusable, the court should consider whether other factors, such as the potential prejudice the appellee may suffer from a late filing, the interests of judicial economy, and the propriety of requiring the defendant to pursue other remedies to redress his counsel's neglect, weigh heavily in favor of permitting the late filing. *Estep v. People*, 753 P.2d 1241 (Colo. 1988).

Estep v. People factors equally important in a juvenile case when appellate review of a judgment of delinquency entered by a magistrate is foreclosed by counsel's failure to file a timely petition for district court review pursuant to § 19-1-108 (5). *People ex rel. M.A.M.*, 167 P.3d 169 (Colo. App. 2007) (decided prior to 2007 repeal of § 19-1-108 (5)).

A knowing and intentional failure to file an appeal does not constitute good cause for extending the filing time pursuant to section (b). *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Judicial economy may constitute excusable neglect under section (b) only when accepting the appeal prevents the case from going back to the trial court on a new motion. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Section (c) is inapplicable as extension of time limit for petition for rehearing set forth in C.A.R. (40)(a). *Garrett v. Garrett*, 30 Colo. App. 167, 505 P.2d 39 (1971).

Application for time extension must generally be made before time prescribed expires. The application for extension, except on the happening of an unforeseen contingency, must be made before the time to take the step for which further time is asked has expired. *La Junta & Lamar Canal Co. v. Fort Lyon Canal Co.*, 25 Colo. 515, 55 P. 728 motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

Otherwise, right to perform act lost. Under C.R.C.P. 6 and C.A.R. 31, a right to file an answer brief is lost where no request for exten-

sion of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. *Fraka v. Malernee*, 129 Colo. 87, 267 P.2d 651 (1954).

Time extension granted where good cause shown. When the required steps in each case cannot be taken within the time limited, on good cause shown such time may be extended. *La Junta & Lamar Canal Co. v. Fort Lyon Canal Co.*, 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

When an appellant pleads for an enlargement of time under this rule solely on the basis that his counsel neglected to file the notice of appeal, such neglect constitutes "good cause" only if it satisfies the excusable neglect standard set forth in *Farmers Ins. Group* (507 P.2d 865). *Estep v. People*, 753 P.2d 1241 (Colo. 1988).

The determination of whether good cause exists for enlargement of time pursuant to this rule for the late filing of a notice of appeal is within the broad discretion of the court of appeals, but such discretion cannot be exercised in a manner that is manifestly arbitrary, unreasonable, or unfair. *Estep v. People*, 753 P.2d 1241 (Colo. 1988).

Stipulations fixing or extending time disregarded unless expressly approved. Parties cannot by stipulation or agreement fix or extend the time for filing briefs in the supreme court contrary to the rules, and, unless such agreements are approved by the court, they will be disregarded. *Wilson v. People*, 25 Colo. 375, 55 P. 721 (1898); *La Junta & Lamar Canal Co. v. Fort Lyon Canal Co.*, 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898); *Estep v. People*, 753 P.2d 1241 (Colo. 1988).

The time for filing an appeal to a decision of the title board is five days after the board denies the motion for rehearing and not five days from the date the secretary of state certifies the documents requested for appeal. *Matter of Title, Ballot Title for 1997-98 No. 62*, 961 P.2d 1077 (Colo. 1998).

The requirement that an appeal be filed within five days from the board's denial of a motion for rehearing is to be construed in conjunction with this rule, thus limiting the computation of five days to exclude Saturday and Sunday. *Matter of Title, Ballot Title for 1997-98 No. 62*, 961 P.2d 1077 (Colo. 1998).

General rule on time computation does not affect specific time limits imposed by statute. A party to a proceeding who received notice of the industrial claim appeals office's order by mail, and who did not file an appeal within 20 days after the date of the certificate of mailing of the order as required by the applicable statute, was not entitled to the additional three days allowed by this rule for service by mail. *Indus.*

Claim Appeals Office v. Zarlingo, 57 P.3d 736 (Colo. 2002).

Applied in Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980); People v. Boivin, 632 P.2d 1038 (Colo. App. 1981); Cline

v. Farmers Ins. Exch., 792 P.2d 305 (Colo. App. 1990); Garcia v. Medved Chevrolet, Inc., 240 P.3d 371 (Colo. App. 2009), aff'd, 263 P.3d 92 (Colo. 2011).

Rule 27. Motions

(a) **Content of Motions; Response.** Unless another form is elsewhere prescribed by these Rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these Rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If the motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. A motion to consolidate an appeal with another appeal shall be served on all other parties in both appeals. Any party may file a response in opposition to a motion other than one for a procedural order [for which see section (b)] within 7 days after service of the motion, but motions authorized by C.A.R. 8, 8.1, 9, and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) **Determination of Motions for Procedural Orders.** Notwithstanding the provisions of section (a) of this Rule as to motions generally, motions for procedural orders, including any motion under C.A.R. 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation, or modification of such action.

(c) **Power of a Single Justice or Judge to Entertain Motions.** In addition to the authority expressly conferred by these Rules or by law, a single justice or judge of the appellate court may entertain and may grant or deny any request for relief which under these Rules may properly be sought by motion, except that a single justice or judge may not dismiss or otherwise determine an appeal or other proceeding, and except that the appellate court may provide by order that any motion or class of motions must be acted upon by the court. The action of a single justice or judge may be reviewed by the court.

(d) **Form of Papers - Number of Copies.** All papers relating to motions shall comply with C.A.R. 32. The original and ten copies shall be filed in the supreme court and the original and five copies in the court of appeals. Only the original of a motion for enlargement of time need be filed. The courts may require that additional copies be furnished.

(e) **No Oral Argument.** There shall not be oral argument on motions.

Source: (d) amended August 30, 1985, effective January 1, 1986; (a) amended and adopted April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Motions Practice in the Court of Appeals", see 23 Colo. Law. 1797 (1994). For article, "Amendments to Ap-

pellate Rules Concerning Type Size and Word Count", see 34 Colo. Law. 27 (June 2005).

Rule 28. Briefs

(a) **Brief of the Appellant.** The brief of the appellant, which shall be entitled "opening brief," shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited;

- (2) A statement of the issues presented for review;
- (3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see section (e));
- (4) An argument. The argument must be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;
- (5) A short conclusion stating the precise relief sought.
- (6) Any request for attorney fees.
- (b) **Brief of the Appellee. — Request for or opposition to. Request for Attorney Fees.** The brief of the appellee, which shall be entitled “answer brief,” shall conform to the requirements of subsections (a)(1) through (a)(6) of this Rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant and appellee must in its answer brief make its request for attorney fees or state any opposition it may have to attorney fees requested in appellant’s brief.
- (c) **Reply Brief. — Opposition to Attorney Fees Request.** The appellant may file a brief which shall be entitled “reply brief,” in reply to the answer brief. Any opposition to attorney fees requested in appellee’s answer brief must be set forth in the reply brief. No further briefs may be filed except with leave of court.
- (d) **References in Briefs to Parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as “appellant” and “appellee”. It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as “the employee”, “the injured person”, “the taxpayer”, etc.
- (e) **References in Briefs to the Record.** References to the bound and paginated record shall be by appropriate page and line numbers and references to material appearing in an addendum to the brief shall be by appropriate page numbers. References to the electronic record shall be by ID number and appropriate page and line number. When the reference is to the evidence, to the giving and refusal to give an instruction, or to a ruling upon the report of a master, the page and line number must be specific, and if the reference is to the exhibit both the page and line number at which the exhibit appears and at which it was offered in evidence must be indicated.
- (f) **Reproduction of Statutes, Rules, Regulations, Etc.** If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.
- (g) **Length of Briefs.** Except by permission of the court, principal briefs shall not exceed thirty pages, and reply briefs shall not exceed eighteen pages, unless they comply with the word limits set forth below. Principal briefs are opening brief, answer brief, opening-answer brief, and answer-reply brief. A principal brief is acceptable if it contains no more than 9,500 words. A reply brief is acceptable if it contains no more than 5,700 words. Headings, footnotes, and quotations count toward the word limitations. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, signature block and any addendum containing statutes, rules, regulations, etc. do not count toward the page limits or word limits.
- (h) **Briefs in Cases Involving Cross-Appeals.** If a cross-appeal is filed, the party first filing the notice of appeal is deemed to be the appellant for the purposes of this Rule unless the parties otherwise stipulate or the court otherwise orders. The appellant shall file the opening brief within the time provided in C.A.R. 31. A cross-appellant shall file a single brief as appellee and cross-appellant at the time the appellee’s brief is due. This brief shall be entitled “opening-answer brief” and must contain the issues and argument involved in the cross-appeal as well as the answer to the brief of the appellant. The appellant’s answer to the argument of the cross-appeal, as well as the reply to appellee’s answer brief, shall be included in a brief entitled “answer-reply brief.” The cross-appellant may then file a reply brief confined strictly to reply to those arguments raised in the cross-appeal.

(i) **Briefs in Cases Involving Multiple Appellants or Appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of Supplemental Authorities.** If pertinent and significant new authority comes to a party's attention after the party's brief has been filed a party may promptly advise the court by notice, with a copy to all parties, setting forth the citation. The notice must state without argument the issue to which the supplemental citation pertains.

(k) **Standard of Review; Preservation.** For each issue raised on appeal, the party raising such issue must provide, under a separate heading placed before discussion of the issue: (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review. A citation of where the issue was preserved for appellate review shall include, if applicable, the record reference where an objection, offer of proof, motion in limine, motion for directed verdict, or other relevant motion was made and ruled on. For each issue, the responding party must provide, under a separate heading placed before discussion of the issue, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Source: IP(a), (b), (c), (g), and (h) amended March 17, 1994, effective July 1, 1994; entire rule amended and adopted December 4, 2003, effective January 1, 2004; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (k) and committee comment added and effective June 22, 2006; (e) amended and effective September 7, 2006; (g) amended and effective May 28, 2009.

COMMITTEE COMMENT

Compliance with subsection (k) does not warrant lengthy discussion but requires only the declaration of the applicable standard of review and the record reference to where the issue was preserved. The following are examples:

(1) An appellate court reviews the wording of an instruction for abuse of discretion. [cite case]. Because this is a criminal case and no

objection was made or alternative instruction tendered in the trial court, the issue should be reviewed for plain error [cite case].

(2) The admissibility of expert testimony is reviewed for abuse of discretion. [cite case] This issue was preserved by appellant's offer of proof. R. ____, p. ____.

ANNOTATION

Law reviews. For article, "How Not to Write a Brief", see 22 *Dicta* 109 (1945). For article, "Supreme Court Proceedings: Rules 111-119", see 23 *Rocky Mt. L. Rev.* 618 (1951). For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 *Dicta* 14 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 *Dicta* 1 (1953). For article, "Some Observations on Colorado Appellate Practice", see 34 *Dicta* 363 (1957). For article, "Some Observations on Brief Writing", see 33 *Rocky Mt. L. Rev.* 23 (1960). For note, "Colorado Appellate Procedure", see 40 *U. Colo. L. Rev.* 551 (1968). For article, "Amendments to Appellate Rules Con-

cerning Type Size and Word Count", see 34 *Colo. Law.* 27 (June 2005). For article, "Complying With C.A.R. 28 and 32", see 39 *Colo. Law.* 65 (November 2010).

Where court could discern that certain issues manifested themselves from a search of the briefs, fact appellant's brief was deficient relative to the requirements of this rule did not require dismissal. *Barr Lake Vill. Metro. Dist. v. Colo. Water Quality Control Comm'n*, 835 P.2d 613 (Colo. App. 1992).

Purpose of rules of court. Rules of court are for the purpose of enforcing an orderly and diligent preparation and submission of causes. *La Junta & Lamar Canal Co. v. Fort Lyon Canal*

Co., 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

Requirements of this rule adopted as aid to court in disposing of causes. The requirements of this rule were not adopted merely for the protection or convenience of litigants, but in a large measure as aids to the court in disposing of causes submitted. *Dubois v. People*, 26 Colo. 165, 57 P. 187 (1899).

Counsel cannot determine for themselves in what manner they shall prepare a case for hearing, in disregard of the requirements prescribed by the rules. *Dubois v. People*, 26 Colo. 165, 57 P. 187 (1899).

Failure to comply with this rule may result in dismissal. *Denver, W. & Pac. Ry. v. Woy*, 7 Colo. 556, 5 P. 815 (1884); *Meyer v. Helland*, 2 Colo. App. 209, 29 P. 1135 (1892); *McDonald v. McLeod*, 3 Colo. App. 344, 33 P. 285 (1893); *Hammond v. Herdman*, 3 Colo. App. 379, 33 P. 933 (1893); *Buckey v. Phenicie*, 4 Colo. App. 204, 35 P. 277 (1894); *Wilson v. People*, 25 Colo. 375, 55 P. 721 (1898); *Dubois v. People*, 26 Colo. 165, 57 P. 187 (1899); *Meldrum v. Bassler*, 40 Colo. 506, 90 P. 1033 (1907); *Knapp v. Fleming*, 127 Colo. 414, 258 P.2d 489 (1953); *Waters v. Culver*, 130 Colo. 360, 275 P.2d 936 (1954).

Or affirmance of judgment. A judgment may be affirmed upon appellant's failure to comply with the requirements for printing briefs. *Mitchell v. Pearson*, 34 Colo. 281, 82 P. 447 (1905).

General composition of briefs. See *Gardner v. City of Englewood*, 131 Colo. 210, 282 P.2d 1084 (1955).

Length and contents of appellate briefs. It is neither necessary nor advisable that every previous procedural move and ruling be presented to the appellate court. Only those procedural steps which are relevant to the issues raised in the appellate court need be recited. *People v. Galimanis*, 728 P.2d 761 (Colo. App. 1986).

For when the limit on length may be modified, see *People v. Galimanis*, 728 P.2d 761 (Colo. App. 1986).

Rule does not extend an open invitation to counsel to conduct additional research after the close of briefing and then present the fruits of such research to the court on the eve of argument. *Glover v. Innis*, 252 P.3d 1204 (Colo. App. 2011).

Sufficient statement of the case is presented by relating only the facts material to a

decision. *F. W. Woolworth Co. v. Peet*, 132 Colo. 11, 284 P.2d 659 (1955).

This rule requires a statement in the brief of the facts material to a decision of the case. *Lowe v. United States Fid. & Guar. Co.*, 171 Colo. 215, 466 P.2d 73 (1970).

Rule provides for a summary of argument. *Farrell v. Bashor*, 140 Colo. 408, 344 P.2d 692 (1959).

Appellant required to set out part of record supporting contentions of error. The elimination of the requirement of an abstract of the record does not relieve the appellant of the duty of setting out such parts of the pleadings, the evidence, the findings, and the judgment as are required to support his contentions of error. *In re Hay's Estate*, 127 Colo. 411, 257 P.2d 972 (1953).

As court will not search through briefs to discover errors and supporting evidence. The court will not search through briefs to discover what errors are relied on, and then search through the record for supporting evidence. It is the task of counsel to inform the court, as required by the rules, both as to the specific errors relied on and the grounds and supporting facts and authorities therefor. *Mauldin v. Lowery*, 127 Colo. 234, 255 P.2d 976 (1953); *Westrac, Inc. v. Walker Field*, 812 P.2d 714 (Colo. App. 1991); *Castillo v. Koppes-Conway*, 148 P.3d 289 (Colo. App. 2006).

Where a taxpayer appeals from an adverse decision in a quo warranto action challenging right of member of the federal rent advisory board to hold office as a city councilman and the federal statutes were not quoted or cited or summarized or analyzed in the record or in the taxpayer's brief, the appellate court will not search through the federal statutes to find grounds of technical disability in order to remove the councilman from office. *People ex rel. Miller v. Cavender*, 123 Colo. 175, 226 P.2d 562 (1950).

Brief held inadequate. *Mauldin v. Lowery*, 127 Colo. 234, 255 P.2d 976 (1953); *In re Hay's Estate*, 127 Colo. 411, 257 P.2d 972 (1953); *Westrac, Inc. v. Walker Field*, 812 P.2d 714 (Colo. App. 1991); *Castillo v. Koppes-Conway*, 148 P.3d 289 (Colo. App. 2006).

Scurrilous brief attacking trial judge stricken. *Knapp v. Fleming*, 127 Colo. 414, 258 P.2d 489 (1953).

Briefs stricken and appeal dismissed due to uncivil language and inadequate argument. *Martin v. Essrig*, ___ P.3d ___ (Colo. App. 2011).

Applied in *Barlow v. Staples*, 28 Colo. App. 93, 470 P.2d 909 (1970).

Rule 29. Brief of an Amicus Curiae

A brief of an amicus curiae may be filed only by leave of court granted on motion or by the request of the court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why

a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons. (Amended and effective September 15, 1971.)

ANNOTATION

Amicus curiae limited to questions raised by appealing parties. An appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional ques-

tions presented in a brief filed by an amicus curiae will not be considered. *Denver United States Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970).

Applied in *First Lutheran Mission v. Dept. of Rev.*, 44 Colo. App. 417, 613 P.2d 351 (1980).

Rule 30. E-Filing

(a) Definitions.

(1) **Document.** A pleading, motion, brief, writing or other paper filed or served under Colorado Appellate Rules.

(2) **E-Filing/Service System.** The E-Filing/Service System ("E-System") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(3) **Electronic Filing.** Electronic filing ("E-Filing") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) **Electronic Service.** Electronic service ("E-Service") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service via the E-System.

(5) **E-System Provider.** The E-Service/E-Filing System Provider authorized by the Colorado Supreme Court.

(6) **S/Name.** A symbol representing the signature of the person whose name follows the "S/" on the electronically or otherwise signed form of the E-Filed or E-Served document.

(b) **Types of Cases Applicable.** E-Filing and E-Service are permissible in all civil, domestic, probate and agency appellate proceedings.

(c) To Whom Applicable.

(1) Attorneys licensed to practice law in Colorado may register to use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(d) **E-Filing — Date and Time of Filing.** A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(e) **E-Service — When Required — Date and Time of Service.** Documents submitted to the court through E-Filing shall be served under C.A.R. 25 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(f) **Filing Party to Maintain the Signed Copy — Paper Document Not to Be Filed — Duration of Maintaining of Document.** A printed or printable copy of an E-Filed or E-Served document with original or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(g) **Documents Requiring E-Filed Signatures.** For all E-Filed and E-Served documents, signatures of attorneys and parties may be in S/Name typed form to satisfy

signature requirements, once the necessary signatures have been obtained on a paper form of the document. Attorneys and parties may also use an electronic ink signature.

(h) Documents under Seal. A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the direction of the court; however, the filing party may object to this procedure.

(i) Transmitting of Orders, Notices, Opinions and Other Court Entries. Appellate courts shall distribute orders, notices, opinions, and other court entries using the E-System in cases where E-Filings were received from any party.

(j) Form of E-Filed Documents. The requirements found in C.A.R. 28, 31, and 32 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

(k) E-Filing May be Mandated. The Chief Justice may mandate, or, with the permission of the Chief Justice, the Chief Judge of the court of appeals may mandate E-Filing for specific case classes or types of cases. An appellate justice or judge may mandate E-Filing and E-Service for a specific case for submitting documents to the court and serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of \$50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory an appellate justice or judge may exclude pro se parties from mandatory E-Filing requirements.

(l) Relief in the Event of Technical Difficulties.

(1) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (a) an error in the transmission of the document to the E-System Provider which was unknown to the sending party; (b) a failure of the E-System Provider to process the E-Filing when received, or (c) other technical problems experienced by the filer or E-System Provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(m) Form of Electronic Documents.

(1) **Electronic Document Format, Size and Density.** Electronic document format, size, and density shall be as specified by Chief Justice Directive #05-02, as amended.

(2) **Multiple Documents.** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document in that filing must bear a separate document title.

ADDITIONAL INFORMATION ON RULE. The Court authorized service provider for the program is LexisNexis File and Serve (www.lexisnexis.com/fileandserve).

Source: Entire rule added and effective February 7, 2008; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file the opening brief within 42 days after the date on which the record is filed. The appellee shall serve and file the answer brief within 35 days after service of the opening brief. The appellant may serve and file a reply brief within 21 days after service of the answer brief. In cases involving cross-appeals, the cross-appellant's opening-answer brief and the appellant's answer-reply brief shall be served and filed within 35 days after service of the opposing party's brief. The cross-appellant may serve and file a reply brief within 21 days after service of the appellant's answer-reply brief.

(b) Number of Copies to be Filed and Served in the Supreme Court. An original and ten copies of each brief shall be filed with the clerk, unless the court by order in a

particular case shall direct a lesser number. A copy shall be served on counsel for each party separately represented.

(c) **Number of Copies to be Filed and Served in the Court of Appeals.** An original and five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number. A copy shall be served on counsel for each party separately represented.

Source: (a) amended March 17, 1994, effective July 1, 1994; (b) and (c) amended May 12, 1994, effective July 1, 1994; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

Purpose and observance of rule. This rule is for the proper dispatch of business, and its observance is required in the interests of litigants generally. *Wilson v. People*, 25 Colo. 375, 55 P. 721 (1898); *People v. J. H. Cooper Enterprises*, 111 Colo. 338, 141 P.2d 414 (1943).

Briefs may not be filed whenever or whenever counsel may find it convenient. *Smith v. Woodall*, 129 Colo. 435, 270 P.2d 746 (1954); *Freeman v. Cross*, 134 Colo. 437, 305 P.2d 759 (1957).

Burden is clearly on appellants to make a timely filing of their opening brief pursuant to this rule and § 24-4-106(4), C.R.S. *Warren Village, Inc. v. Bd. of Assmt. Appeals*, 619 P.2d 60 (Colo. 1980); *Wilkinson v. Motor Vehicle Div.*, 634 P.2d 1016 (Colo. App. 1981).

Right to file answer brief is lost where no request for extension of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. *Fraka v. Malernee*, 129 Colo. 87, 267 P.2d 651 (1954).

Court's discretion to dismiss. Dismissal for failure to comply with statutory time limitations

for filing briefs is within the discretion of the trial court. *Wilkinson v. Motor Vehicle Div.*, 634 P.2d 1016 (Colo. App. 1981).

Time for filing when motion to dismiss appeal denied. Time for filing an answer brief on the merits, where a motion to dismiss an appeal is denied, shall commence to run on the date of the announcement of the opinion; otherwise, this rule will control in the matter of filing briefs. *Johnson v. George*, 119 Colo. 153, 200 P.2d 931 (1948).

Judicial review of agency action pursuant to § 24-4-106(4), C.R.S., is subject to the time limitations specified in section (a) of this rule. Dismissal for failure to comply with statutory time limitations for filing briefs is left within the trial court's discretion. *DuPuis v. Charnes*, 668 P.2d 1 (Colo. 1983).

Agreement between parties extending time not binding on court. A court is not bound by an agreement between parties which extends the time for filing briefs. *Wilkinson v. Motor Vehicle Div.*, 634 P.2d 1016 (Colo. App. 1981).

Applied in *Smith v. County of El Paso*, 42 Colo. App. 316, 593 P.2d 979 (1979); *People v. Boivin*, 632 P.2d 1038 (Colo. App. 1981).

Rule 32. Form of Briefs and Appellate Documents

(a) **Standards for Non-Typewriter-Produced Briefs and Other Appellate Papers.** Except for briefs and other appellate papers produced through the use of a typewriter, all briefs and appellate papers including those E-filed must comply with following standards:

(1) The typeface must be 14-point or larger, except that the caption may be in 12-point if necessary to fit on one page.

(2) The typeface must be a plain, roman style, although italics or boldface may be used for emphasis.

(3) If a brief or other appellate paper is subject to a word limit, it must include a certificate by the attorney, or by an unrepresented party, that the paper complies with the applicable word limit. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the paper. The certificate must state the number of words in the paper.

(b) Standards for All Briefs and Other Appellate Papers. All briefs and other appellate papers, including those produced through the use of a typewriter, must comply with the following standards.

(1) Only 8 1/2 by 11 inch paper shall be used.

(2) Text shall be double-spaced, except that quotations more than two lines long may be indented and single-spaced, and headings and footnotes may be single-spaced.

(3) Margins shall be no less than 1 1/2 inches at the top and 1 inch at the left, right, and bottom, excluding page numbering, which shall be required.

(4) Text shall appear only on the face side of each page.

(c) Binding and Duplication. Briefs and other appellate papers shall be produced by any duplicating or copying process which produces a clear black image on white paper. Carbon copies may not be submitted without permission of the court, except by parties allowed to proceed in forma pauperis. Consecutive sheets shall be attached at the top left margin.

(d) Basic Document Information. Each brief or other appellate document shall contain basic document information on the first page of the document. The information in the case caption shall be arranged in the following order and shall be in the forms illustrated in subsection (1) or (2) below, except that documents issued by the court or clerk of court should omit the attorney section as illustrated in subsection (1)(II) and (2)(II):

On the left side:

Court name and mailing address.

Name of lower court(s), lower court judge(s), and case number(s).

Names of parties.

Name, address, and telephone number of attorney or pro se party filing the document. Fax number and e-mail address are optional.

Attorney registration number.

Document title.

On the right side:

An area for "Court Use Only" that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court information).

Case number.

(1) Illustration of Preferred Case Caption Format:
(I) Preferred Caption for documents initiated by a party:

[Designation of Court]		
Court Address:		
[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]		
Appellant(s): <i>[Substitute appropriate party designations & names]</i> v. Appellee(s):		
Attorney or Party Without Attorney: Name: Address: Phone Number: FAX Number: E-mail: Atty. Reg.#:		▲ COURT USE ONLY ▲ Case Number:
NAME OF DOCUMENT		

(II) Preferred Caption for documents issued by the court or clerk of court:

[Designation of Court]		
Court Address:		
[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]		
Appellant(s): <i>[Substitute appropriate party designations & names]</i> v. Appellee(s):		
NAME OF DOCUMENT		▲ COURT USE ONLY ▲ Case Number:

- (2) **Illustration of Optional Case Caption:**
- (I) **Optional Caption for documents initiated by a party:**

[Designation of Court]

Court Address:

[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]

Appellant(s):

[Substitute appropriate party designations & names]

v.

Appellee(s):

Attorney or Party Without Attorney:

Name:

Address:

Phone Number:

FAX Number:

E-mail:

Atty. Reg.#:

▲ COURT USE ONLY ▲

Case Number:

NAME OF DOCUMENT

(II) **Optional Caption for documents issued by the court or clerk of court:**

[Designation of Court]

Court Address:

[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]

Appellant(s):

[Substitute appropriate party designations & names]

v.

Appellee(s):

▲ COURT USE ONLY ▲

Case Number:

NAME OF DOCUMENT

(e) **Improper Form of Briefs and Other Papers.** In the event the clerk determines that a brief or other paper does not comply with the Colorado Appellate Rules or is not sufficiently legible, the clerk shall accept the document for filing but may require that a conforming document be filed.

(f) **Certificate of Compliance.** Each brief shall include, on a separate page immediately behind the caption page, a certificate that the brief complies with all requirements of C.A.R. 28 and C.A.R. 32. Form 6 is a suggested form for a certificate of compliance, use of which shall be regarded as meeting the requirements of C.A.R. 32(a)(3) and C.A.R. 32(f).

Source: (a), (b), and (c)(2) amended and (d) added, effective July 8, 1993; entire rule amended and adopted March 13, 1997, effective July 1, 1997; (c) amended and Comment added June 1, 2000, effective July 1, 2000; entire rule and Comment amended and adopted June 28, 2001, effective July 1, 2001; (c)(1)(II) and (c)(2)(II) corrected July 24, 2001,

effective nunc pro tunc July 1, 2001; entire rule amended and adopted February 24, 2005, effective July 1, 2005; IP(a) amended and effective February 7, 2008; (f) added and effective May 28, 2009.

COMMENT

This rule conforms the appellate practice to the forms of case captions provided in C.R.C.P. 10 for all documents that are filed in Colorado courts, including both criminal and civil cases. The purpose of the form captions is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently.

The preferred case caption format for documents initiated by a party is found in subsection (c)(1)(I). The preferred caption for documents issued by the court or clerk of court is found in subsection (c)(1)(II). Because some parties may have difficulty formatting their documents to include vertical lines and boxes, alternate case caption formats are found in subsections (c)(2)(I) and (c)(2)(II). However, the box format is the preferred and recommended format.

The boxes may be vertically elongated to accommodate additional party and attorney information if necessary. The "court use" and

"case number" boxes, however, shall always be located in the upper right side of the caption.

Forms approved by the State Court Administrator's Office (designated "JDF" or "SCAO" on pre-printed or computer-generated forms), forms set forth in the Colorado Court Rules, volume 12, C.R.S. (including those pre-printed or computer-generated forms designated "CRCP" or "CPC" and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, "ICON," shall conform to criteria established by the State Court Administrator's Office with the approval of the Colorado Supreme Court. This includes pre-printed and computer-generated forms. JDF and SCAO forms and a flexible form of caption which allows the entry of additional party and attorney information are available and can be downloaded from the Colorado courts web page at <http://www.courts.state.co.us/scao/Forms.htm>.

ANNOTATION

Law reviews. For article, "Amendments to Appellate Rules Concerning Type Size and Word Count", see 34 Colo. Law. 27 (June 2005). For article, "Complying With C.A.R. 28 and 32", see 39 Colo. Law. 65 (November 2010).

Noncompliance will result in dismissal. Where an appellant fails to comply with this

provision, the appeal will be dismissed. *Dubois v. People*, 26 Colo. 165, 57 P. 187 (1899).

Example of noncompliance. A reply brief which is in indistinct and blurred typewriting flagrantly violates this provision. *Mitchell v. Pearson*, 34 Colo. 281, 82 P. 447 (1905).

Rule 33. Prehearing Conference

The appellate court may direct the attorneys for the parties to appear before the said court or a judge or justice thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

ANNOTATION

Law reviews. For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

Rule 34. Oral Argument

(a) **Notice of Argument; Postponement.** The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) **Time Allowed for Argument.**

(1) **In the Supreme Court.** Oral argument may be allowed at the discretion of the court. A request for oral argument shall be made in a separate, appropriately titled document and filed no later than 7 days after the briefs are closed. In the absence of a request for oral argument, the court may order oral argument. Unless otherwise ordered by the court, each side will be allowed thirty minutes for argument. A request for additional time may be made by motion filed within 7 days after the briefs are closed, but shall be granted only if good cause is shown. The court may terminate the argument whenever in its judgment further argument is unnecessary.

(2) **In the Court of Appeals.** Oral argument in the Court of Appeals will be allowed upon the written request of a party or upon the court's own motion, unless the court, in its discretion, dispenses with oral argument. A request for oral argument shall be made in a separate, appropriately titled document filed no later than 7 days after the briefs are closed. Unless otherwise ordered, argument shall not exceed fifteen minutes for the appellants and fifteen minutes for the appellees. The court may terminate the argument whenever in its judgment further argument is unnecessary.

Comment: This change places a limit on the time period for filing a request for oral argument. The time period is the same as the limit for filing a request for additional time.

(c) **Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a concise statement of the case. Counsel will not be permitted to read at length from briefs, records, or authorities. Counsel are limited in their arguments to issues raised in the briefs, unless permitted by the court.

(d) **Cross and Separate Appeals.** A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(e) **Nonappearance of Parties.** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) **Submission on Briefs.** By written stipulation the parties may request that the case be stricken from the oral argument calendar and be submitted to the court on the briefs.

(g) **Use of Physical Exhibits at Argument; Removal.** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

(h) **Supreme Court Sessions En Banc and in Departments.** The chief justice may convene the court en banc at any time, and shall do so on the written request of three justices. Subject to this provision, or as limited by the constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the justices to hear such arguments, shall be under the direction and control of the chief justice. In case of his absence or inability to act such duties shall devolve upon the deputy chief justice.

Source: (b)(1) and (c) amended March 15, 1985, effective July 1, 1985; (b) amended August 30, 1985, effective January 1, 1986; (d) amended and adopted April 4, 1996,

effective July 1, 1996; (b)(2) amended and effective September 9, 2004; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mt. L. Rev. 618 (1951).

Decision on briefs satisfies obligation of counsel on criminal appeal. Where counsel for the parties filed with the court a statement requesting a decision upon the briefs of the respective parties without oral argument pursuant to section (f), it was held that the statement was in accord with the standards of criminal justice, as they relate to the obligations of counsel for

the defendant on appeal. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Requests for further oral arguments. Where no request for further oral argument was made, nor was any request for an argument en banc made until after the announcement of the court's decision, the right, if it existed, was waived. *Scott v. Shook*, 80 Colo. 40, 249 P. 259, 47 A.L.R. 1108 (1926) (decided under former Supreme Court Rule 43).

Rule 35. Determination of Appeal

(a) Failure to Prosecute Appeal.

Deleted September 23, 1983, effective January 1, 1984.

(b) Advancement on Docket. Any pending action may be advanced on the docket and may be disposed of in such order as the court shall determine. In matters of great public importance the court may make such orders relating to the time and necessity for the filing of printed, typewritten, mimeographed or otherwise reproduced briefs, and the time and necessity for oral argument as it deems the circumstances demand.

(c) Affirmation. When an appeal is dismissed the appellate court may affirm the judgment. When the appeal is dismissed, or the judgment is affirmed, the clerk of the trial court, upon the filing in his office of the remittitur, shall issue execution upon the judgment and proceed as though no appeal had been prosecuted.

(d) Reversal. On reversing a judgment the appellate court may order a retrial only of specified questions of fact. On a partial reversal it may enter such judgment as it shall deem proper or may remand the cause for further proceedings. Upon remand for further proceedings the payment of costs by the appellee shall not be a condition thereof, but the costs recovered upon appeal shall await final determination of the case. If final determination be adverse to appellant, his costs recovered on appeal shall be offset against the judgment finally recovered against him.

(e) Disposition of Cause. In all cases on appeal the appellate court may enter final judgment and may issue execution thereon, or may remand the cause to the trial court in order that execution may there be issued or that other proceedings may be had therein. Any judgment may be affirmed without written opinion, but on reversal the court shall give its reasons for such action, except in cases where it renders judgment or directs what judgment shall be entered in the trial court. When the Supreme Court acting en banc is equally divided in an opinion, the judgment appealed from shall stand affirmed. The appellate court shall disregard any error or defect not affecting the substantial rights of the parties.

(f) Published Opinions of Court of Appeals. A majority of all of the judges of the Court of Appeals shall determine which opinions of that court shall be designated for official publication. They shall be published in whatever official publication is designated by the Supreme Court. Those opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.

No opinion of the Court of Appeals shall be designated for official publication unless it satisfies one or more of the following standards: (1) the opinion lays down a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) the opinion involves a legal issue of continuing public interest; (3) the majority opinion, dissent, or special concurrence directs attention to the shortcomings of

existing common law or inadequacies in statutes; (4) the opinion resolves an apparent conflict of authority.

An opinion of the Court of Appeals not designated for official publication shall bear, on the title page, the legend, "NOT PUBLISHED PURSUANT TO C.A.R. 35(f)."

If the Supreme Court grants certiorari to a Court of Appeals opinion not designated for official publication, and if the Supreme Court announces an opinion in the case, the Court of Appeals' opinion shall not be published unless otherwise ordered by the Supreme Court.

Denial of certiorari by the Supreme Court shall not necessarily be taken as approval of any opinion of the Court of Appeals.

Source: (f) amended and adopted June 27, 2002, effective July 1, 2002; (f) amended and effective February 7, 2008; (e) amended and effective April 5, 2010.

Cross references: For provision on harmless error in proceedings before the trial court, see C.R.C.P. 61.

ANNOTATION

- I. General Consideration.
- II. Affirmation.
- III. Reversal.
- IV. Disposition of Cause.
 - A. In General.
 - B. Equally Divided Court.
 - C. Error Not Affecting Substantial Rights of the Parties.
- V. Published Opinions of Court of Appeals.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Supreme Court Proceedings: Rules 111-119", see 23 Rocky Mt. L. Rev. 618 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982). For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986).

Where question presented on appeal is moot, dismissal of the appeal is in order. *People in Interest of P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971).

An appeal from order of foreclosure on real property was mooted where record reveals a conscious and voluntary choice by the defendants to allow the property to be sold to satisfy the judgment. *Stenback v. Front Range Financial Corp.*, 764 P.2d 380 (Colo. App. 1988).

Appeal becomes moot if events subsequent to the filing of the appeal render the issues present moot. *In re Hartley*, 886 P.2d 665 (Colo. 1994).

A case is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy. *In re Hartley*, 886 P.2d 665 (Colo. 1994).

Decision on review reinvests jurisdiction in lower court. When a case is determined in the supreme court on review, the lower court is thereupon immediately reinvested with jurisdiction without the issuance of, or receipt by the clerk of the trial court, of a remittitur. *Haggott v. Plains Iron Works Co.*, 74 Colo. 37, 218 P. 909 (1923).

Remittitur is not essential. The former rule directing the clerk to issue remittitur contained no suggestion that it is essential to further proceeding in the trial court. The practice from earliest times has been for the clerk to issue the mandate only upon request. *Haggott v. Plains Iron Works Co.*, 74 Colo. 37, 218 P. 909 (1923).

Supreme court has jurisdiction to compel obedience to its remittitur to district court to require that court to show cause as to whether and in what manner remittitur had been complied with. *Green v. Green*, 170 Colo. 197, 460 P.2d 224 (1969).

Applied in *Brinker v. City of Sterling*, 121 Colo. 430, 217 P.2d 613 (1950); *Lewis v. Oliver*, 129 Colo. 479, 271 P.2d 1055 (1954); *Pettingell v. Moede*, 129 Colo. 484, 271 P.2d 1038 (1954); *Bohn v. Bd. of Adjustment*, 129 Colo. 539, 271 P.2d 1051 (1954); *Am. Nat'l Bank v. Hereford State Bank*, 139 Colo. 345, 338 P.2d 1032 (1959); *Colo. Interstate Gas Co. v. Logan Props. Corp.*, 140 Colo. 411, 344 P.2d 693 (1959); *McKenzie v. People*, 178 Colo. 450, 497 P.2d 1262 (1972); *People v. Chavez*, 179 Colo. 69, 498 P.2d 341 (1972); *Thornburg v. Homestead Minerals Corp.*, 184 Colo. 141, 518 P.2d 941 (1974); *Coen v. Boulder Valley Sch. Dist. No. RE-2*, 402 F. Supp. 1335 (D. Colo. 1975); *People v. Morris*, 190 Colo. 215, 545 P.2d 151 (1976); *Martin v. District Court*, 191 Colo. 107, 550 P.2d 864 (1976); *Columbine Valley Constr. Co. v. Bd. of Dirs.*, 626 P.2d 686 (Colo. 1981); *Jackson v. Harsco Corp.*, 653 P.2d 407 (Colo. App. 1982); *Palmer v. A.H. Robins*

Co., Inc., 684 P.2d 187 (Colo. 1984); Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985); Banek v. Thomas, 733 P.2d 1171 (Colo. 1986); Coors v. Sec. Life of Denver Ins. Co., 112 P.3d 59 (Colo. 2005).

II. AFFIRMATION.

Findings of the trial court will not be disturbed on review unless they are clearly erroneous. C.K.A. v. M.S., 695 P.2d 785 (Colo. App. 1984), cert. denied, 705 P.2d 1391 (Colo. 1985).

Affirmance of the trial court's action disposes of all issues properly presented for review. Mills v. Saunders, 30 Colo. App. 462, 494 P.2d 1309 (1972).

Judgment affirmed where a retrial would result in the same judgment. Boyd v. Munson, 59 Colo. 166, 147 P. 662 (1915); Swanson v. First Nat'l Bank, 74 Colo. 135, 219 P. 784 (1923).

Or when supported by substantial evidence. A determination by a quasi-judicial body is not arbitrary or capricious, and thus not an abuse of discretion, where it is supported by substantial competent evidence, and it will be affirmed on review. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

Where the sufficiency of the evidence to support a guilty verdict is challenged, an appellate court must review the testimony in the light most favorable to the prosecution. If there is sufficient competent evidence to establish the essential elements of a crime, a guilty verdict will not be overturned by an appellate court even though there are conflicts and inconsistencies in the evidence. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

The court of appeals should not substitute its opinion of what damages are appropriate for that of the jury. Mere disagreement with the amount of damages awarded is not a sufficient ground to overturn an award of damages which is supported by competent evidence in the record as it is the sole province of the jury to fix fair and just damages, and only upon a showing of arbitrary or capricious jury action, or that the jury was swayed by passion or prejudice, should an appellate court overturn a jury verdict. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982); Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

Where the evidence is conflicting, a reviewing court should not disregard the jury's verdict, which has support in the evidence, in favor of its own view of the evidence, but must reconcile the verdict with the evidence if at all possible, and if there is any basis for the verdict, it will not be reversed for inconsistency. Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

There was evidence in the record to support the jury award of zero noneconomic

damages, and the fact that the jury instruction mandated that the jury "shall determine" the amount of noneconomic damages did not necessarily require an affirmative award of damages since an award of such damages was required only if the damages were caused by the petitioners' negligence. Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

Deference is given to the trial court's findings of fact which will not be overturned as long as there is support for them. This is true even though a contrary position may find support in the record and even though the court might have reached a different result had it been acting as the finder of fact. People v. Thomas, 853 P.2d 1147 (Colo. 1993).

Correct judgment entered for the wrong reason will be affirmed. Klipfel v. Neill, 30 Colo. App. 428, 494 P.2d 115 (1972).

III. REVERSAL.

Retrial may be ordered on liability only. On reversal of a judgment in an action for damages, the reviewing court may order retrial only upon the question of liability, holding the amount of damages to have been established on the first trial. Boyle v. Bay, 81 Colo. 125, 254 P. 156 (1927).

Or on amount of damages. Where the amount of the judgment due plaintiff was determined on conflicting evidence, a reversal of the judgment will require that the amount be set aside in its entirety pending a trial court determination of the sum properly due plaintiff. Farmers Elevator Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972) aff'd, 181 Colo. 231, 508 P.2d 1261 (1973).

Mixed questions of law and fact presented for determination must be decided by the trial court, and where left undecided, the cause will be remanded for additional findings. Cook v. Cook, 74 Colo. 339, 221 P. 883 (1923).

When court may direct that proper judgment be entered. Where on review the record clearly discloses the entry of a judgment by the trial court finding all issues for the plaintiff but for an erroneous sum, the cause may be remanded with directions to enter the proper judgment. Mystic Tailoring Co. v. Jacobstein, 94 Colo. 306, 30 P.2d 263 (1934).

In appeal involving challenge to sales and use tax provisions of municipal code, appropriate remedy on appeal is not remand to district court for de novo review under § 29-2-106.1 since taxpayer pursued review under municipal code. Arapahoe Roofing & Sheet Metal v. Denver, 831 P.2d 451 (Colo. 1992).

Judgment reversed where appeal and questions presented are moot. An ordinance passed while an action is pending on error renders the question before the supreme court moot, and a new zoning resolution adopted by

the board of county commissioners even before the action is commenced renders the original action moot. Holding that the action before the lower court and the proceedings on appeal before the supreme court are on questions that are now moot, the judgment of the trial court is reversed and the cause is remanded with directions to dismiss the complaint. *Bd. of Adjustment v. Iwerks*, 135 Colo. 578, 316 P.2d 573 (1957).

Abstract claim, as an afterthought on appeal, will not support reversal. *Anderson v. People*, 176 Colo. 224, 490 P.2d 47 (1971), cert. denied, 405 U.S. 1042, 92 S. Ct. 1376, 31 L. Ed. 2d 583 (1972).

IV. DISPOSITION OF CAUSE.

A. In General.

Duties of trial court. Upon regaining jurisdiction, a trial court, through the use of its own enforcement procedures, is then responsible for execution on its own judgment in accordance with any directions issued by an appellate court. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. *Menefee v. City & County of Denver*, 190 Colo. 163, 544 P.2d 382 (1976).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. *Menefee v. City & County of Denver*, 190 Colo. 163, 544 P.2d 382 (1976).

B. Equally Divided Court.

Affirmed by operation of law. Where one justice did not sit and the remaining six divided equally, the judgment is affirmed by operation of law. *Speer v. People ex rel. Rush*, 52 Colo. 325, 122 P. 768 (1912); *City & County of Denver v. Gunter*, 63 Colo. 69, 163 P. 1118 (1917); *Menzel v. McKee Live Stock Comm'n Co.*, 71 Colo. 326, 206 P. 383 (1922); *People v. Stapleton*, 79 Colo. 629, 247 P. 1062 (1926); *Craddock v. Craddock*, 90 Colo. 284, 8 P.2d 1112 (1932); *La Argo v. Cronbaugh*, 90 Colo. 286, 8 P.2d 1112 (1932); *Midland Oil Ref. Co. v. Allen*, 93 Colo. 102, 23 P.2d 1119 (1933); *People ex rel. Link v. Tucker*, 96 Colo. 273, 42 P.2d 472 (1935); *Pring v. Brown*, 96 Colo. 284, 42 P.2d 607 (1935); *Larson v. Kalcevic*, 99 Colo. 279, 62 P.2d 572 (1936); *Courtright v. Legislative Statutory Comm'n*, 100 Colo. 82, 65 P.2d 710, cert. denied, 302 U.S. 695, 58 S.Ct. 13, 82 L. Ed. 537 (1937); *Creel v. Pueblo Masonic Bldgs. Ass'n*, 100 Colo. 281, 68 P.2d 23 (1937); *Taylor v. Bd. of Control of State*

Indus. Sch., 105 Colo. 219, 94 P.2d 184 (1939); *Snyder v. Bd. for Appointment of Civil Serv. Comm'rs*, 106 Colo. 83, 101 P.2d 436 (1940); *Roenfeldt v. Rinker*, 108 Colo. 359, 116 P.2d 964 (1941); *Butler v. Byrne*, 108 Colo. 507, 120 P.2d 196 (1941); *Henderson v. Anderson*, 108 Colo. 529, 120 P.2d 195 (1941); *Hinkley v. Oriental Ref. Co.*, 116 Colo. 33, 178 P.2d 416 (1947); *White v. Jensen*, 116 Colo. 378, 182 P.2d 139 (1947); *DeWitt v. Victor Am. Fuel Co.*, 116 Colo. 450, 181 P.2d 816 (1947); *State v. Knight-Campbell Music Co.*, 117 Colo. 326, 187 P.2d 931 (1947); *Oestereick v. Roper*, 122 Colo. 59, 220 P.2d 551 (1950); *Metropolitan Life Ins. Co. v. Hoffman*, 122 Colo. 431, 222 P.2d 620 (1950); *Eresch v. Hines*, 122 Colo. 588, 225 P.2d 59 (1950); *In re McNeal's Estate*, 124 Colo. 99, 234 P.2d 622 (1951); *Hix v. Stanchfield*, 124 Colo. 422, 238 P.2d 200 (1951); *Jabelonsky v. Fike*, 125 Colo. 487, 244 P.2d 1081 (1952); *City & County of Denver v. Bd. of County Comm'rs*, 145 Colo. 451, 359 P.2d 1031 (1961); *State Dept. of Hwys. v. Biella*, 672 P.2d 529 (Colo. 1983); *Pease v. District Court*, 708 P.2d 800 (Colo. 1985).

Constitutes no precedent. A judgment by an equally divided court constitutes no precedent. *People ex rel. Walker v. Stapleton*, 79 Colo. 629, 247 P. 1062 (1926).

Same question cannot be relitigated between the same parties merely by bringing in a different action. *In re Craddock's Estate*, 91 Colo. 79, 11 P.2d 807 (1932).

Because judgment has the same effect as if entered with the approval of all the justices. *In re Craddock's Estate*, 91 Colo. 79, 11 P.2d 807 (1932).

C. Error Not Affecting Substantial Rights of the Parties.

Error which clearly does not prejudice substantial rights of the complaining party is not ground for reversal. *Swanson v. First Nat'l Bank*, 74 Colo. 135, 219 P. 784 (1923); *Thuro v. Meredith*, 75 Colo. 471, 226 P. 867 (1924); *Myers v. Hayden*, 82 Colo. 98, 257 P. 351 (1927); *Parker v. Ullom*, 84 Colo. 433, 271 P. 187 (1928).

"Substantial right" defined. In construing this rule, as well as C.R.C.P. 61, a substantial right is one which relates to the subject matter and not to a matter of procedure and form. *Sowder v. Inhelder*, 119 Colo. 196, 201 P.2d 533 (1948).

Variance between pleading and proof does not affect substantial rights. *Hiner v. Cassidy*, 92 Colo. 78, 18 P.2d 309 (1932).

The variance was not such as affected the substantial right of the parties and was, therefore, such error or defect as the supreme court may disregard. *Southwestern Sur. Ins. Co. v.*

Miller, 63 Colo. 15, 164 P. 507 (1917); Otis & Co. v. Teal, 74 Colo. 336, 221 P. 884 (1923).

Harmless instruction does not affect substantial rights. Howard v. Mitchell, 27 Colo. App. 45, 146 P. 486 (1915).

Improper admission of evidence to a fact which is established by other sufficient evidence does not affect substantial rights. Patterson v. People ex rel. Parr, 23 Colo. App. 479, 130 P. 618 (1913).

Appellate review of trial court's determination pursuant to § 13-25-129 regarding admissibility of child's hearsay statement should be based upon record made at in limine hearing and may go beyond such record only if issue of harmless error or plain error is raised. People v. Bowers, 801 P.2d 511 (Colo. 1990).

Defect in summons. Error cannot be predicated on any defect in a summons unless the

defect results in prejudice. Hocks v. Farmers Union Coop. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

Receipt of verdict in absence of trial judge is technical error. Although the trial judge was not present when the verdict was received, it did not appear that any substantial rights of the defendant were violated by the trial court's procedure, and, as directed by this rule, mere technicalities would not constitute ground for reversal. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948).

V. PUBLISHED OPINIONS OF COURT OF APPEALS.

An unpublished court of appeals decision has no value as precedent. In re Ballot Title 2005-06 No. 55, 138 P.3d 273 (Colo. 2006).

Rule 36. Entry of Judgment

The notation of a decision in the docket constitutes entry of the appellate judgment. The clerk of the appellate court shall prepare, sign, and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign, and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign, and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 37. Interest on Judgments

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the mandate shall contain instructions with respect to allowance of interest.

ANNOTATION

This rule is identical to Federal Appellate Rule 37. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975).

Appellate court's authority to determine interest is exclusive. While the appellate court may, of course, remand to the trial court for a determination of the proper statutory interest, the trial court, without such an instruction, lacks jurisdiction to enter any amount of interest not stated in the mandate. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975); In re Gutfreund, 148 P.3d 136 (Colo. 2006).

Proper method of attacking an appellate court's instructions as to interest is to petition for amendment or recall of the mandate. Such a procedure is available in Colorado. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975).

Applied in Loesean v. Benefit Trust Life Ins. Co., 37 Colo. App. 493, 552 P.2d 36 (1976); Westec Constr. Mgmt. Co. v. Postle Enter. I, Inc., 68 P.3d 529 (Colo. App. 2002).

Rule 38. Sanctions

(a) Dismissal for Failure of Appellant to Cause Timely Transmission of the Record. If the appellant fails to cause timely transmission of the record, an appellee, upon payment of the docket fee, may move for the dismissal of the appeal. The motion shall be supported by a certificate of the clerk of the trial court showing the date of the judgment or order from which the appeal was taken. The motion shall also be supported by the case file

in the office of the clerk of the appellate court in which it is filed, the expiration of any order extending the time for transmitting the record, and proof of service of the notice of appeal. The appellant may respond within fourteen days of service of the motion to dismiss.

(b) **Consequence of Failure to File Brief.** If an appellant or cross-appellant fails to file a brief within the time provided by this rule, or within the time extended, an appellee or cross-appellee may move for dismissal of the appeal or cross-appeal. The court may dispense with oral argument if an appellee or cross-appellee fails to file a brief.

(c) **Failure to Prosecute Appeal.** In all cases where the appellant fails duly to prosecute the appeal, the appellate court, may, upon dismissal thereof, enter judgment against the appellant for not more than twenty percent of the amount of the judgment as damages and costs in consequence of the delay occasioned by the appeal.

(d) **Sanctions for Frivolous Appeal.** If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

(e) **General Powers of the Court.** The appellate court may apply such sanction as it deems appropriate, including dismissal, for the failure to comply with any of its orders or with these appellate rules.

Comment: This rule now gathers all the sanctions specified in the appellate rules into one rule and broadens the powers of the court by the addition of (e).

ANNOTATION

Law reviews. For comment, "Attorney Fee Assessments for Frivolous Litigation in Colorado", see 56 U. Colo. L. Rev. 663 (1985).

Due process considerations. When an appellate court imposes sanctions upon an appellant, due process requires that the appellant be afforded certain protections before being deprived of his property. He is entitled to notice and an opportunity to respond. *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984).

Award against state for damages may only be ordered if authorized by statute. *People in Interest of A.L.B.*, 683 P.2d 813 (Colo. App. 1984).

No basis for damages where genuine issue in dispute. There is no basis for an award of damages pursuant to this rule where there is a genuine disputed issue in the matter on appeal. *Rocky Mt. Sales & Serv., Inc. v. Havana RV, Inc.*, 635 P.2d 935 (Colo. App. 1981).

Even where trial court's entry of summary judgment in favor of defendant is upheld on appeal and no genuine issue of material fact is found to have existed, plaintiff's appeal is not automatically frivolous and defendant's request for fees may be denied. *Price v. Conoco, Inc.*, 748 P.2d 349 (Colo. App. 1987).

Appeal held not frivolous because of absence of Colorado authority on the question forming basis of appeal. *Jorgenson Realty, Inc. v. Box*, 701 P.2d 1256 (Colo. App. 1985).

Abuse of discretion. In light of the significance of the issues on appeal (i.e., the state's obligation to maintain state prisoners in state correctional facilities and to reimburse counties for confining state prisoners) and the fact that both petitioner and respondent sought appellate

review, court of appeals abused its discretion in dismissing case for failure to timely transmit the record. *Dept. of Corr. v. Pena*, 788 P.2d 143 (Colo. 1990).

Substantiality of issues. When determining whether dismissal is an appropriate sanction for failure to timely transmit the record, an appellate court should consider the substantiality of the issues on appeal and the full range of possible sanctions and should select the sanction most appropriate under the circumstances. *Dept. of Corr. v. Pena*, 788 P.2d 143 (Colo. 1990).

Because the theory propounded on appeal was not a "relitigation" of a settled issue, wholly lacking in precedential support, devoid of a plausible rationale, or brought vexatiously, it cannot be said to be "frivolous". *Wood Brothers Homes, Inc. v. Howard*, 862 P.2d 925 (Colo. 1993) (decided under former § 13-80-127); *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

Damages not awarded where amount not specified. Where a number of the issues raised by the appellant are frivolous, but where the appellee has not specified an amount requested for damages, the appellate court will decline to award damages. *In re Mann*, 655 P.2d 814 (Colo. 1982).

Appeal should be considered frivolous if the proponent can present no rational argument based on the evidence or law in support of a proponent's claim or defense, or the appeal is prosecuted for the sole purpose of harassment or delay. *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984).

Appeal held to be frivolous, and attorney's fees assessed. *Rogers v. Charnes*, 656 P.2d

1322 (Colo. App. 1982); *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993); *In re Purcell*, 879 P.2d 468 (Colo. App. 1994); *Martin v. Essrig*, __ P.3d __ (Colo. App. 2011).

An appeal "lacks substantial justification" and is "substantially frivolous" when the appellant's brief fails to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error supported by legal authority. As a result, it is appropriate to assess attorney fees against the attorney prosecuting the appeal in this case. *Castillo v. Koppes-Conway*, 148 P.3d 289 (Colo. App. 2006).

Because appeal is not frivolous, court denies defendants' request for their appellate attorney fees pursuant to paragraph (d) of this rule. *Lobato v. Taylor*, 13 P.3d 821 (Colo. App. 2000), rev'd on other grounds, 71 P.3d 938 (Colo. 2002).

Board of education is entitled to reasonable attorney fees incurred in defending claim of breach of duty to teach morality in public schools where plaintiff relied primarily on overruled case law, constitutional and statutory provisions that imposed no duty, and where plaintiff presented no rational argument based on existing law. *Skipworth v. Bd. of Educ.*, 874 P.2d 487 (Colo. App. 1994).

A claim is frivolous if the proponent can present no rational argument based on the evidence or the law in support thereof. Such test encompasses appeals that are manifestly

insufficient or futile. *Lego v. Schmidt*, 805 P.2d 1119 (Colo. App. 1990).

No sanctions awarded for frivolous appeal even though the court rejected appellants' public policy argument. *In re Estate of Schlagel*, 89 P.3d 419 (Colo. App. 2003).

Request for costs pursuant to this rule denied. *Dewar v. LeNard*, 653 P.2d 82 (Colo. App. 1982); *People ex rel. A.R.D.*, 43 P.3d 632 (Colo. App. 2001).

Applied in *In re Estate of Perini*, 34 Colo. App. 201, 526 P.2d 313 (1974); *In re Trask*, 40 Colo. App. 556, 580 P.2d 825 (1978); *Sports Premiums, Inc. v. Kaemmer*, 42 Colo. App. 172, 595 P.2d 696 (1979); *Applewood Gardens Homeowners' Ass'n v. Richter*, 42 Colo. App. 510, 596 P.2d 1226 (1979); *In re Erickson*, 43 Colo. App. 319, 602 P.2d 909 (1979); *In re Joseph*, 44 Colo. App. 128, 613 P.2d 344 (1980); *Wyatt v. United Airlines*, 638 P.2d 812 (Colo. App. 1981); *In re Norton*, 640 P.2d 254 (Colo. App. 1981); *People in Interest of W.M.*, 643 P.2d 794 (Colo. App. 1982); *United Bank of Denver Nat'l Ass'n v. Pierson*, 661 P.2d 1191 (Colo. App. 1982); *Smith v. Colo. Dept. of Rev.*, 661 P.2d 1192 (Colo. App. 1982); *Schoonover v. Hedlund Abstract Co. Inc.*, 727 P.2d 408 (Colo. App. 1986); *Citicorp Mortg., Inc. v. Younger*, 856 P.2d 52 (Colo. App. 1993); *Anderson v. Somatogen, Inc.*, 940 P.2d 1079 (Colo. App. 1996); *In re Custody of C.J.S.*, 37 P.3d 479 (Colo. App. 2001); *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005).

Rule 39. Costs

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) **Costs For and Against the State of Colorado.** In cases involving the State of Colorado or an agency or officer thereof, if an award of costs against the State is authorized by law, costs shall be awarded in accordance with the provisions of section (a) of this Rule; otherwise, costs shall not be awarded for or against the state.

(c) **Costs on Appeal Taxable in the Appellate Court.** The cost of printing or otherwise producing necessary copies of briefs or copies of records shall be taxable in the appellate court at rates not higher than those generally charged for such work in Denver. Docket fees charged pursuant to C.A.R. 12(a) shall be taxed in the appellate court as costs of the appeal in favor of a party entitled to costs under the Rule. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which shall be filed with the clerk, with proof of service, within 14 days after the entry of judgment.

(d) **Clerk to Insert Costs in Mandate.** The clerk of the appellate court shall prepare and certify an itemized statement of costs taxed in the appellate court for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the appellate court.

(e) **Costs on Appeal Taxable in the Trial Courts.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the

determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this Rule.

Source: (c) and (e) amended May 15, 1986, effective November 1, 1986; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For costs incurred in civil actions in general, see article 16 of title 13, C.R.S.

ANNOTATION

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953).

Costs, strictly so called, are a matter of statute or rule of court. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

Costs are recoverable only by virtue of the statute allowing them. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1899); Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Costs are limited to docket fees and the expense of producing necessary copies of briefs filed with the appellate court. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

The appellate court is the appropriate court for determination of an award of costs under this rule. Where the trial court awarded costs of the appeal on remand, following a denial by the appellate court of an untimely request for costs under this rule, the trial court erred. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Court discretion. The use of the word "shall" in section (a) does not mean that a trial court is required to award costs sought under section (e) to a prevailing party on appeal or that the court only has discretion with respect to the amount. In re Goodbinder, 119 P.3d 584 (Colo. App. 2005).

Costs and attorney fees distinguished. Where there is statutory authorization for an award of attorney fees incurred by the prevailing party in defending a judgment on appeal, the question of what court should determine the amount awarded is not governed by this or any other rule. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

In the absence of any statute, rule, or precedent limiting the trial court's jurisdiction to award prevailing party appellate attorney fees, an application to the trial court was appropriate.

Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Costs are only to reimburse the successful party. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

For all trials of same cause. Where there is more than one trial of the same cause, the successful party is entitled to recover costs for all the trials. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922).

And including annexation proceedings. Under this rule the successful party may recover costs incurred in the supreme court upon appeal in annexation proceedings. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1898).

Where suit is instituted and prosecuted vexatiously, defendant's attorney fees may be taxed as costs. London v. Allison, 87 Colo. 27, 284 P. 776 (1930).

In action in mandamus to compel a city council to grant a permit, where judgment is for the plaintiff, he is entitled to recover from the defending officials who voted against granting the permit his costs taxed in the trial court, but not from those who voted in favor of granting the permit. City of Colorado Springs v. Street, 81 Colo. 181, 254 P. 440 (1927).

This rule does not include a case dismissed for want of jurisdiction. Bartels v. Hoey, 3 Colo. 279 (1877).

Objection barred after payment of costs. When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. Webber v. Phister, 71 Colo. 332, 206 P. 385 (1922).

Rationale for section (b) limitation. The limitation in section (b) stems from the basic concept that costs should not be charged against a sovereign state, unless the proper authority so directs. People in Interest of W.M., 643 P.2d 794 (Colo. App. 1982).

Applied in In re Trask, 40 Colo. App. 556, 580 P.2d 825 (1978); Caldwell v. Armstrong, 642 P.2d 47 (Colo. App. 1981); Holcomb v. Steven D. Smith, Inc., 170 P.3d 815 (Colo. App. 2007); URS Group, Inc. v. Tetra Tech FW, Inc.,

181 P.3d 380 (Colo. App. 2008); *Lucht's Concrete Pumping, Inc. v. Horner*, 224 P.3d 355

(Colo. App. 2009), rev'd on other grounds, 255 P.3d 1058 (Colo. 2011).

Rule 39.5. Attorney Fees on Appeal

If attorney fees are otherwise recoverable for the particular appeal, the party claiming attorney fees shall specifically request them, and state the legal basis therefor, in the party's principal brief in the appellate court. Any opposition to a request for attorney fees shall be set forth, as pertinent, in either the answer or reply brief. The appellate court may determine entitlement to and the amount of any attorney fees for the appeal. In its discretion, the appellate court may remand to the trial court or tribunal below the determination of entitlement to or the amount of any attorney fees.

Source: Entire rule added and adopted December 4, 2003, effective January 1, 2004; entire rule corrected February 2, 2004, nun pro tunc December 4, 2003, effective January 1, 2004.

ANNOTATION

Merely identifying the statute under which fees are requested, without stating the specific grounds that justify an award of fees, does not adequately comply with this rule. In re Newell, 192 P.3d 529 (Colo. App. 2008).

Neither party is entitled to recover its appellate attorney fees from the estate where decedent's siblings and nieces are contesting who is entitled to the estate proceeds, and their respective attorneys are not employed by the personal representative. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

No award of attorney fees to condominium association on appeal under this rule and § 38-33.3-123. Section 38-33-123 (1)(c) provides for recovery of attorney fees only in actions to "enforce or defend the provision of this article or of the declaration, bylaws, articles, or

rules and regulations". Condominium association defended against purchasers' breach of contract action and sought declaratory action that contract was void. Neither purchasers' claims nor associations' counterclaims were to enforce or defend the article; thus, the statute does not apply. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

Contract provision concerning attorney fees should be considered on remand where it was not part of the record on appeal. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

Appellate attorney fees are only awardable where requesting party states a legal basis for recovery. In re Wells, 252 P.3d 1212 (Colo. App. 2011).

Rule 40. Petition for Rehearing

(a) **Time for Filing; Content; Answer; Action by Court if Granted.** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) **Form of Petition; Length.** The petition shall comply with C.A.R. 32, and on the front cover there shall be the number and title of the case, the court from which the appeal was taken, the name of the trial judge, the name of the justice or judge who wrote the opinion, and, if in the Supreme Court, shall state whether the decision was en banc; and, if a departmental decision of the Supreme Court, or of a division of the Court of Appeals, the names of the justices or judges participating. Copies of the petition shall be served and filed as prescribed by C.A.R. 31 for the service and filing of briefs. Except by permission of court a petition for rehearing shall not exceed six pages, unless it contains no more than 1,900 words.

Source: (b) amended and adopted April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982). For article, "Amendments to Appellate Rules Concerning Type Size and Word Count", see 34 Colo. Law. 27 (June 2005).

Object of a petition for rehearing is to give the parties an opportunity to point out mistakes of law or fact, or both, which it may be claimed the court has made in reaching its conclusion. *Norris v. Kelsey*, 60 Colo. 297, 152 P. 1167 (1915).

Direct attack upon the judgment after the mandate has issued is not contemplated by the appellate rules. *Garrett v. Garrett*, 30 Colo. App. 167, 490 P.2d 313 (1971).

Rule inapplicable to decision neither raised nor argued. The prohibitions of this rule do not apply where a cause is decided upon a question not raised by the record nor argued by counsel. *Model Land & Irrigation Co. v. Baca Irrigating Ditch Co.*, 83 Colo. 131, 262 P. 517 (1927).

Rule does not prohibit the citation of authorities, or a reference to those cited in the briefs. *Book v. Book*, 71 Colo. 502, 208 P. 474 (1922).

Appellate court has no duty to accept untimely petition. Nothing in the language of this rule would imply nor was it the intention of this court in drafting this language that there be a duty on the part of the appellate court to accept an untimely petition for rehearing. The only duty which this rule creates is that the court use its sound discretion in considering a request for any extension of time. *Wiggins v. People*, 199 Colo. 341, 608 P.2d 348 (1980).

Refusal to enlarge time was an abuse of discretion where the failure to timely file was due to the failure of the clerk of the court of appeals to mail copies of the court of appeals opinion to the third party defendants as required by C.A.R. 36. *Brewster v. Nandrea*, 705 P.2d 1 (Colo. 1985).

Appellate court's jurisdiction not relinquished pending petition for rehearing. The

appellate court holds jurisdiction of the cause for a fixed period for the purpose of permitting an application for a rehearing, and in no case except upon special order, is this jurisdiction relinquished during such period. *Norris v. Kelsey*, 60 Colo. 297, 152 P. 1167 (1915).

If a petition for rehearing is filed, jurisdiction is retained until such application is finally disposed of, and which may result in a modification or even a reversal of the original judgment of the appellate court. *Norris v. Kelsey*, 60 Colo. 297, 152 P. 1167 (1915).

Jurisdiction of district court is not restored until cause is finally disposed of by appellate court. *Norris v. Kelsey*, 60 Colo. 297, 152 P. 1167 (1915).

Evenly divided vote denies petition. A three to three division of the supreme court on the question of granting or denying the first petition for a rehearing operates to deny that petition. For that reason, under this rule, the appellant was without legal right to file the second petition for rehearing, and should not have been permitted to do so. Such petition, if filed, should be stricken, or if not stricken, then denied. *People ex rel. Link v. Tucker*, 96 Colo. 273, 42 P.2d 472 (1935).

C.A.R. 26(c) inapplicable as time extension. C.A.R. 26(c), relating to additional time after service by mail, has no application as an extension of time limit set forth in section (a) of this rule. *Garrett v. Garrett*, 30 Colo. App. 167, 490 P.2d 313 (1971).

Petition held to sufficiently state issue. A petition stating a point the court might have overlooked, and showing the relation of that point to the court's decision, and nothing irrelevant thereto, does not violate this rule. *Colburn v. Ernst*, 75 Colo. 120, 223 P. 759 (1924).

Petition which contains insulting criticism of the courts or flagrantly disregards court rules will be stricken. *Goodrich v. Union Oil Co.*, 85 Colo. 218, 274 P. 935 (1929).

Applied in *Honey v. Ranchers & Farmers Livestock Auction Co.*, 191 Colo. 503, 553 P.2d 799 (1976); *People v. Parsons*, 645 P.2d 850 (Colo. 1982).

Rule 41. Issuance of Mandate

(a) **Form.** A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.

(b) **Time.** Unless the court grants or removes a stay, or otherwise changes the time by order, the mandate shall issue as follows:

(1) The mandate of the court of appeals shall issue 43 days after entry of the judgment. In workers' compensation and unemployment insurance cases, the mandate of the court of appeals shall issue thirty-one days after entry of the judgment. The timely filing of a petition for rehearing will stay the mandate until the court has ruled on the petition. If a motion for enlargement of time to file a petition for rehearing is granted but no petition for rehearing is filed within the extended period, the mandate may issue following the last day of the extended period for filing the petition for rehearing or after the day specified by this rule, whichever occurs later.

(2) If a petition for rehearing is denied, the mandate shall issue 29 days after entry of the order denying the petition. In workers' compensation and unemployment insurance cases, the mandate of the court of appeals shall issue 15 days after entry of the order denying a petition for rehearing.

(3) The mandate of the supreme court shall issue 14 days after the entry of judgment. The timely filing of a petition for rehearing will stay the mandate until the court has ruled on the petition. If the petition for rehearing is denied, the mandate shall issue two days after entry of the order denying the petition.

Source: Entire rule amended and adopted November 20, 1998, effective January 1, 1999; entire rule amended and adopted and committee comment added and adopted December 14, 2000, effective January 1, 2001; committee comment corrected and effective January 4, 2001; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The purpose of this amendment is to clarify that the Court of Appeals can extend the stay of the issuance of the mandate when an extension of time to file a petition for rehearing is timely filed. The rule change addresses the specific problem that arises when, after an extension has

been granted, no petition for rehearing is filed. Practitioners had been concerned that, without having filed a petition for rehearing, any petition for certiorari filed beyond the time specified in the rule for stay of the issuance of the mandate would be untimely.

ANNOTATION

Intent is to establish finality of judgment. The mandate provided for in this rule intended to establish the finality of the judgment upon which the parties can rely. *Garrett v. Garrett*, 30 Colo. App. 167, 490 P.2d 313 (1971); *Hrabczuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994).

Direct attack upon the judgment after the mandate has issued is not contemplated by the appellate rules. *Garrett v. Garrett*, 30 Colo. App. 167, 490 P.2d 313 (1971). See *Hrabczuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994).

Lower court without jurisdiction until date mandate may issue. The date when the mandate may issue under this rule must be held

to be the earliest date upon which the district court can acquire jurisdiction. Until this occurs the lower court is without jurisdiction for any purpose. *Norris v. Kelsey*, 60 Colo. 297, 152 P. 1167 (1915); *People v. Jones*, 631 P.2d 1132 (Colo. 1981).

Directions in remand "for consideration of the request for attorney fees" set out in order are controlling over language contained in mandate form regarding attorney fees issued by the clerk's office of the court. *Hrabczuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994).

Applied in *People v. Martinez*, 186 Colo. 388, 527 P.2d 534 (1974).

Rule 41.1. Stay or Recall of Mandate

The Supreme Court, the Court of Appeals, or a justice or judge thereof may upon just terms stay the issuance of, or recall, any mandate of the Court of Appeals until the time for seeking review by the Supreme Court expires, or if review is timely sought until it is granted or refused, or if review is granted until final disposition of the case by the Supreme Court. The stay may apply to any judgment entered or standing affirmed in any court pursuant to the mandate of the Court of Appeals. In cases in which review by the Supreme

Court of the United States may be sought, the court whose decision is sought to be reviewed or a justice or judge thereof, and in any event the Supreme Court of Colorado, or a justice thereof, may stay or recall the mandate, as may be appropriate.

ANNOTATION

Division exceeded its authority when it initially stayed and later withdrew the mandate because the court's authority to stay or withdraw a mandate expired when the supreme court denied the defendant's writ of certiorari. *People v. Bonilla-Garcia*, 51 P.3d 1035 (Colo. App. 2001).

An intermediate appellate court has the inherent power to stay its mandate following

the denial of certiorari by the supreme court upon a showing of "exceptional circumstances". A supervening change in governing law that calls into question the correctness of the court's decision satisfies the "exceptional circumstances" criteria. *People v. McAfee*, 160 P.3d 277 (Colo. App. 2007).

Applied in *Wiggins v. People*, 199 Colo. 341, 608 P.2d 348 (1980).

Rule 42. Voluntary Dismissal

(a) Dismissal in the Trial Court.

Deleted September 23, 1983, effective January 1, 1984.

(b) Dismissal in the Appellate Court. If the parties to an appeal or other proceeding sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and pay whatever fees are due, the clerk shall dismiss the appeal, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Comment: Rule 42(a) is no longer necessary.

Source: Entire rule amended and effective January 6, 2005.

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the appellate court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25, C.R.C.P. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appellate court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the appellate court in accordance with this section (a). If a party entitled to appeal dies before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the appellate court in accordance with this section (a).

(b) Substitution for Other Causes. If substitution of a party in the appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in section (a).

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceedings in the appellate court in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An

order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 44. Cases Involving Constitutional Questions Where State of Colorado is Not a Party

(a) In a review involving the constitutionality of any Colorado statute in which neither the state nor any state agency nor any representative thereof is a party, the party raising such question shall give immediate notice in writing to the Supreme Court of the existence of the question. The clerk shall thereupon certify such fact to the attorney general.

(b) In a review involving the validity, interpretation or application of any section of the Public Utilities Law of the State of Colorado or of any rule or regulation or order or of any certificate or permit issued by the Public Utilities Commission of the State of Colorado in which the Public Utilities Commission is not a party, the party raising such question shall give immediate notice in writing to the appellate court of the existence of the question. The clerk of such appellate court shall thereupon certify such fact to the Secretary of the Public Utilities Commission of the State of Colorado.

(c) In a review involving a municipally owned utility wherein it appears that the decision of the appellate court may impact upon the powers and duties of the Public Utilities Commission of the State of Colorado or upon the interpretation of the Public Utilities Law of the State of Colorado, the clerk of the appellate court shall notify the Secretary of the Public Utilities Commission of the State of Colorado of the pendency of such litigation and invite the Public Utilities Commission to intervene or to enter an appearance as *amicus curiae*.

Rule 45. Duties of Clerk

(a) **General Provisions.** The clerk of the appellate court shall take an oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or as counselor in any court while he continues in office. The appellate court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk, with the clerk or a deputy in attendance, shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, as defined in C.A.R. 26, but the chief justice may provide by order for the opening or closing of the appellate court clerk's office during specified hours on other days.

(b) **The Docket; Calendar; Other Records Required.** The clerk shall keep a docket, in such form and style as may be prescribed by the appellate court, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the page of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders, and judgments shall be entered chronologically in the docket on the page assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the chief justice or chief judge a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the court.

(c) **Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) **Custody of Records and Papers.** The clerk shall have custody of the records and papers of the court. He shall not permit any original record or paper to be taken from his custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and other printed papers filed.

**Rule 46. Review of Workers' Compensation Decisions
of the Industrial Claim Appeals Panel
by the Court of Appeals**

Repealed, effective January 26, 1995.

Rule 46.1. Time for Petitioning

Repealed, effective January 26, 1995.

**Rule 46.2. Review on Certiorari
to the Court of Appeals — How Sought**

Repealed, effective January 26, 1995.

Rule 46.3. The Petition for Certiorari

Repealed, effective January 26, 1995.

Rule 46.4. Order Granting or Denying Certiorari

Repealed, effective January 26, 1995.

Rule 46.5. Briefs — In General

Repealed, effective January 26, 1995.

Rule 46.6. Oral Argument

Repealed, effective January 26, 1995.

Rule 46.7. Further Review

Repealed, effective January 26, 1995.

Rules 47 and 48. No Colorado Rules

JURISDICTION ON WRIT OF CERTIORARI

Rule 49. Considerations Governing Review on Certiorari

(a) **Addressed to Judicial Discretion.** A review in the Supreme Court on writ of certiorari as provided in section 13-4-108, C.R.S., and section 13-6-310, C.R.S., is a matter of sound judicial discretion and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the district or superior court on appeal from the county court has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals, or district or superior court on appeal from the county court, has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of said court; the same ground applies to judgments and

decrees of district courts on appeal from the county court when a decision is in conflict with another district court on the same matters;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

The common-law writ of certiorari serves to correct substantial errors of law not otherwise reviewable which are committed by an inferior tribunal. *Sutterfield v. District Court*, 165 Colo. 225, 438 P.2d 236 (1968).

Statutes creating appellate remedies take precedence over judicial rules of procedure. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Scope of constitutional rule-making power. The manner in which subject matter jurisdiction is exercised is properly within the scope of the supreme court's rule-making powers vested by § 2(1) of art. VI, Colo. Const. This procedure has been established and is set forth in C.A.R. 50 to 57. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Supreme court may not expand jurisdiction by rule. Supreme court jurisdiction, as initially spelled out in the Colorado constitution, may be expanded by statute. But there is no authority for the supreme court to expand its jurisdiction by rule of court. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Certiorari is proper remedy to protect substantial right. An original proceeding in the nature of certiorari under this rule, when directed to an endangered, fundamentally substantive and substantial right, is maintainable and recognized as a proper remedy. *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952); *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Where usual review does not afford adequate protection. The power of certiorari is exercisable where usual review on appeal would not afford adequate protection to substantive rights of the petitioners. *Sutterfield v. District Court*, 165 Colo. 225, 438 P.2d 236 (1968).

Certiorari may be granted to determine a policy. Where no well-defined policy has emerged on a subject, the court will grant certiorari in order to make such a determination. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. *Menefee v. City & County of Denver*, 190 Colo. 163, 544 P.2d 382 (1976).

The issuance of a writ of certiorari is always discretionary. *Sutterfield v. District Court*, 165 Colo. 225, 438 P.2d 236 (1968).

Review of interlocutory orders. The supreme court has the power under § 3 of art. VI, Colo. Const., to issue certiorari to review interlocutory orders of lower courts. *Sutterfield v. District Court*, 165 Colo. 225, 438 P.2d 236 (1968).

The proper proceeding for relief from an interlocutory order is by certiorari. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Review of eminent domain interlocutory order. Within the period of stay of execution granted by a trial court, the owners of property being condemned, not having the right of review of an interlocutory order on appeal, may file original action by way of certiorari in the supreme court, alleging that otherwise they are without remedy whatsoever to protect their property from seizure under an order of a district court, which they contend is without lawful authority. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Pretrial proceedings reviewable. The denial of an asserted right in pretrial proceedings, not otherwise reviewable, may be determined by means of an original proceeding in certiorari in the supreme court. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari granted where judgment would render question moot. Application for an original writ of mandamus or certiorari in the supreme court is the only procedure by which to test the validity of a trial court's ruling where the question involved, if permitted to await final judgment, would become moot. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari to review joinder of claims was issued where all parties would be put to unnecessary delay and expense were it required that one or both of these tort claims be fully tried before determining whether the claims should have remained joined in the first instance. Should plaintiffs obtain a favorable judgment in both lawsuits, none of the parties will be in a position to raise the procedural question of separate trials posed by this original proceeding. *Sutterfield v. District Court*, 165 Colo. 225, 438 P.2d 236 (1968).

Amended answers ordered to be struck. In an original proceeding for relief as in certiorari,

it was held that the district court should strike amended and amending answers which it allowed to be filed subsequent to the supreme court's remanding order which mentioned the specific pleadings out of which the trial court should ascertain the issues and on which it should conduct the trial. *People ex rel. Henderson v. Greeley Nat'l Bank*, 112 Colo. 274, 148 P.2d 580 (1944).

Review of superior court's reversal of county court. The supreme court may review by certiorari a superior court's reversal of a county court judgment. *People v. Dee*, 638 P.2d 749 (Colo. 1981).

The appellate review of county court judgments by the superior court is subject to ultimate review by the supreme court, since any party has the right to petition for a writ of certiorari. *People v. Superior Court*, 175 Colo. 391, 488 P.2d 66 (1971).

Certiorari dismissed where denial of charge of venue may be considered on appeal. Under applicable rules of civil procedure, where a motion for change of venue has been filed by defendants and said motion has been denied, the defendants can thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said motion. An original proceeding in the nature of a writ of certiorari to review the denial of a motion for change of venue by a district court will be dismissed. *Colo. State Bd. of Exam'rs of Architects v. District Court*, 126 Colo. 340, 249 P.2d 146 (1952).

Where conviction necessarily involves only a factual issue, certiorari to review such conviction will be dismissed as improvidently granted. *Erickson v. City & County of Denver*, 179 Colo. 412, 500 P.2d 1183 (1972).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. *Menefee v. City & County of Denver*, 190 Colo. 163, 544 P.2d 382 (1976).

Where a decision of a reviewing court could not result in further proceedings against the petitioner, he has no standing to prosecute appellate proceedings beyond the court where his acquittal occurred. *Garcia v. City of Pueblo*, 176 Colo. 96, 489 P.2d 200 (1971).

Moot question not reviewed. Where the question involved does not have that degree of public importance to justify review of a moot question, it is properly dismissed. *People in Interest of P. L. V.*, 176 Colo. 342, 490 P.2d 685 (1971).

Appellate courts are bound by the jury's findings where there is sufficient competent evidence in the record to support the finding, where the jury makes the finding on conflicting evidence, and where the jury has been correctly instructed by the trial court. *Vigil v. Pine*, 176 Colo. 384, 490 P.2d 934 (1971).

Applied in *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971); *Bd. of County Comm'rs v. Fifty-first Gen. Ass'y*, 198 Colo. 302, 599 P.2d 887 (1979).

Rule 50. Certiorari to Court of Appeals Before Judgment

(a) Considerations Governing. A writ of certiorari from the Supreme Court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted upon a showing:

(1) That the case involves a matter of substance not heretofore determined by the Supreme Court of Colorado, or that the case if decided according to the relief sought on appeal involves the overruling of a previous decision of the Supreme Court; or

(2) That the Court of Appeals is being asked to decide an important state question which has not been, but should be, determined by the Supreme Court; or

(3) That the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the Supreme Court.

(b) By Whom Sought. The petition for a writ may be filed by either party or by stipulation of the parties. The Court of Appeals on its own motion may request transfer to the Supreme Court, or the Supreme Court may on its own motion require transfer of the case to it.

Cross references: For general considerations governing certiorari, see C.A.R. 49; for certification and transfer of cases, see §§ 13-4-109 and 13-4-110, C.R.S.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating

Procedures", see 11 Colo. Law. 356 (1982). For comment, "In the Interest of R.C., Minor Child:

The Colorado Artificial Insemination by Donor Statute and the Non-Traditional Family”, see 67 Den. U.L. Rev. 79 (1990).

Procedure provides for appellate review. The procedure established in § 13-4-108(2), C.R.S., and in C.A.R. 50 through C.A.R. 57, C.A.R., clearly provides for appellate review in the supreme court. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

And is constitutional. The changes brought about by pertinent statutes with respect to the jurisdiction of the supreme court and the court of appeals are within the authority of the general assembly. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Review similar to common-law certiorari. The form of certiorari review the supreme court will maintain over the court of appeals is quite similar to the common-law review by certiorari, and distinguishable from the limited ancillary type of certiorari in existence in past years under Rule 106(a)(4), C.R.C.P. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

The supreme court may retain and review an appeal of a declaratory order of the state

personnel board that should have been filed with the court of appeals. The court’s authority rests in its power under section (b) to review cases pending in the court of appeals prior to judgment and under C.A.R. 2 to suspend the rules of appellate procedure. *Colo. Ass’n of Pub. Emp. v. Dept. of Hwys.*, 809 P.2d 988 (Colo. 1991).

Study of petition and record constitutes review. The study by the supreme court of the petition provided in the Colorado appellate rules and of the record on appeal to determine whether to grant or deny the petition constitutes a review. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Applied in *Ackmann v. Merchants Mtg. & Trust Corp.*, 645 P.2d 7 (Colo. 1982); *Slack v. City of Colo. Springs*, 655 P.2d 376 (Colo. 1982); *Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass’n*, 661 P.2d 254 (Colo. 1983); *Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass’n*, 661 P.2d 257 (Colo. 1983); *Krause v. Columbia Sav. & Loan Ass’n*, 661 P.2d 265 (Colo. 1983); *In the Interest of R.C.*, 775 P.2d 27 (Colo. 1989); *Romer v. Bd. of County Comm’rs, Weld County*, 897 P.2d 779 (Colo. 1995).

Rule 51. Review on Certiorari — How Sought

(a) **Filing and Proof of Service.** Review on certiorari shall be sought by filing with the clerk of the Supreme Court, with service had and proof thereof as required by C.A.R. 25, ten typewritten or otherwise reproduced copies of a petition which shall be in the form prescribed in C.A.R. 32 and a transcript of the record in the case as filed in said court which shall be certified by the clerk of the appropriate court. Service of a copy of the transcript of the record is not required.

(b) **Appearance and Docket Fee.** Upon the filing of the petition and the certified transcript of the record, counsel for the petitioner shall enter an appearance and pay the docket fee of \$225.00, of which \$1.00 shall be transferred to the state general fund as a tax levy pursuant to section 2-5-119, C.R.S. The case shall then be placed in the certiorari docket.

(c) **Notice to Respondents.** It shall be the duty of counsel for the petitioner to notify all the respondents of the date of filing, and of the docket number of the case, and that the transcript of the record has been filed in the Supreme Court.

(d) **Docket Fee.** Upon entry of appearance, counsel for respondent shall pay the docket fee of \$115.00.

Source: (a) amended and effective March 23, 2000; (b) and (d) amended and adopted February 27, 2003, effective March 3, 2003.

ANNOTATION

Law reviews. For article, “A Summary of Colorado Supreme Court Internal Operating Procedures”, see 11 Colo. Law. 356 (1982).

Rule 51.1. Exhaustion of State Remedies Requirement in Criminal Cases

(a) **Exhaustion of Remedies.** In all appeals from criminal convictions or post-conviction relief matters from or after July 1, 1974, a litigant shall not be required to petition for

rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when a claim has been presented to the Court of Appeals or Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

(b) **Savings Clause.** If a litigant's petition for federal habeas corpus is dismissed or denied for failure to exhaust state remedies based on a decision that this rule is ineffective, the litigant shall have 49 days from the date of such dismissal or denial within which to file a motion to recall the mandate together with a writ of certiorari presenting any claim of error not previously presented in reliance on this rule.

Source: Entire rule added and effective May 18, 2006; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 52. Review on Certiorari — Time for Petitioning

(a) **To Review a District Court Judgment.** A petition for writ of certiorari to review a judgment of a district court on appeal from a county court, shall be filed not later than 42 days after the rendition of the final judgment in said court.

(b) **To Review Court of Appeals Judgment.**

(1) Filing a petition for rehearing in the Court of Appeals, before seeking certiorari review in the Supreme Court, is optional.

(2) No petition for issuance of a writ of certiorari may be submitted to the Supreme Court until the time for filing a petition for rehearing in the Court of Appeals has expired.

(3) Any petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed in the Supreme Court within 42 days of the issuance of the opinion of the Court of Appeals, if no petition for rehearing is filed, or within 28 days after the denial of a petition for rehearing by the Court of Appeals. Any petition for writ of certiorari to review a judgment of the Court of Appeals in workers' compensation and unemployment insurance cases shall be filed in the Supreme Court within 28 days after the issuance of the opinion of the Court of Appeals, if no petition of rehearing is filed, or within 14 days after the denial of a petition for rehearing by the Court of Appeals.

Source: (b) amended June 4, 1987, effective January 1, 1988; (a) amended and effective May 17, 1990; (b) amended July 11, 1991, effective July 1, 1991; (b) amended and adopted November 20, 1998, effective January 1, 1999; (b)(3) amended and effective February 7, 2008; (b)(3) amended and effective May 28, 2009; (a) and (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law, 356 (1982).

When a petition for rehearing of a municipal court judgment is timely filed in the district court, the district court judgment will not become final for purposes of this rule until the district court denies the petition. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).

If a party files a conditional cross-petition for certiorari of issues not reached unless the underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. *Farmers Group, Inc. v. Williams*, 805 P.2d 419 (Colo. 1991).

Health maintenance organization (HMO) could not seek certiorari where HMO was dismissed from suit on its motion for summary judgment, was not a party in the court of appeals, was not substantially aggrieved by the disposition of the case by the court of appeals, and did not file the prerequisite petition for rehearing. *Colo. Permanente Medical Group v. Evans*, 926 P.2d 1218 (Colo. 1996).

Applied in *Honey v. Ranchers & Farmers Livestock Auction Co.*, 191 Colo. 503, 553 P.2d 799 (1976); *Wiggins v. People*, 199 Colo. 341, 608 P.2d 348 (1980); *People v. Dee*, 638 P.2d 749 (Colo. 1981); *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

**Rule 53. Petition for Certiorari and
Cross-Petition for Certiorari**

(a) **The Petition.** The petition for certiorari shall be succinct and shall not exceed twelve pages, unless it contains no more than 3,800 words, exclusive of appendix. The petition shall comply with C.A.R. 32. The petition shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(2) A reference to the official or unofficial reports of the opinion or judgment and decree of the court, which shall be in an appendix containing the papers as provided in subsection (6) of this rule.

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

(A) The date of the judgment or decree sought to be reviewed and the time of its entry;

(B) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari.

(4) A concise statement of the case containing the matters material to consideration of the issues presented.

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(6) An appendix containing:

(A) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals;

(B) If review of a judgment of the district court on an appeal from a county court is sought, a copy of the findings, judgment and decree in question; and

(C) The text of any pertinent statute or ordinance.

(7) Repealed.

(b) **The Cross-Petition.** Within 14 days after service of the petition for certiorari, a respondent may file and serve a cross-petition. A cross-petition shall be succinct and shall not exceed twelve pages, unless it contains no more than 3,800 words, exclusive of appendix. The cross-petition shall comply with C.A.R. 32. A cross-petition shall have the same contents, in the same order, as the petition.

(c) **Opposition Brief.** Within 14 days after service of the petition, respondent may file and serve an opposition brief, a cross-petition or both. The petitioner may file an opposition brief within 14 days after service of a cross-petition. An opposition brief shall be succinct and shall not exceed twelve pages, unless it contains no more than 3,800 words. The opposition brief shall comply with C.A.R. 32.

(d) **Reply Brief.** Within 7 days after service of an opposition brief, a petitioner or cross-petitioner may file and serve a reply brief. A reply brief shall be succinct and shall not exceed ten pages, unless it contains no more than 3,150 words. The reply brief shall comply with C.A.R. 32.

(e) **No Separate Brief.** No separate brief may be appended to the petition, any cross-petition, the opposition brief, or the reply brief.

(f) **Filing and Service.** An original and ten copies of all petitions and briefs shall be filed with the clerk of the supreme court. Service shall be in the same manner as provided for service of the notice of appeal.

Source: Entire rule repealed and readopted August 30, 1985, effective January 1, 1986; IP(a) and (b) to (d) amended and effective July 8, 1993; rule title amended and effective April 7, 1994; (a)(7) repealed, (e) amended, and (f) added April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (b), (c), and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982). For article, "Amendments to Appellate Rules Concerning Type Size and Word Count", see 34 Colo. Law. 27 (June 2005).

The petition for writ of certiorari is an application of right. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

If a party files a conditional cross-petition for certiorari of issues not reached unless the

underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. Farmers Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991).

Issue held not to be fairly comprised within issues raised by petition for certiorari, as required by subsection (a)(3). Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900 (Colo. 1982).

Applied in County of Clearwater v. Petrash, 198 Colo. 231, 598 P.2d 138 (1979).

Rule 54. Order Granting or Denying Certiorari

(a) Grant of Writ. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. The order shall direct that the certified transcript of record on file be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

(b) Denial of Writ. No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. If, after granting the writ, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982). For article, "Amendments to Appellate Rules Concerning Type Size and Word Count", see 34 Colo. Law. 27 (June 2005).

Review by certiorari constitutes appellate review under the Colorado constitution. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

The denial of a petition for certiorari is "appellate review" as that term is used in the Colorado constitution. Bill Dreiling Motor Co. v.

Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Rule 55. Stay Pending Review on Certiorari

Application to the Supreme Court for stay of execution of a decision of the Court of Appeals or the judgment of a district or superior court on appeal from a county court will normally not be entertained until application for a stay has first been made to the court rendering the decision sought to be reviewed.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 56. Extension of Time

After appearance is made and a docket fee paid, the Supreme Court for good cause shown may upon motion enlarge the time prescribed by these rules for filing a petition for writ of certiorari, or may permit the petition to be filed after the expiration of such time.

Comment: This change requires an appearance and payment of the docket fee under Rule 51(b) before counsel will be permitted to file a motion for the enlargement of time in which to file the writ of certiorari.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 57. Briefs — In General

Briefs on the Merits. Briefs of the petitioner and the respondent on the merits may be typewritten and in the form as permitted in C.A.R. 32 and filed within the time as provided in C.A.R. 31; except that in workers' compensation cases the petitioner shall serve and file the petitioner's opening brief within ten days and the respondent shall file the respondent's brief within five days after service of the petitioner's brief, and no other brief shall be permitted. The rule concerning the content and length of briefs shall be the same as in C.A.R. 28. Incorporation by reference of briefs previously filed in the lower court is prohibited.

Source: Entire rule amended June 4, 1987, effective January 1, 1988; entire rule amended and effective July 8, 1993.

ANNOTATION

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 58. Citation

These rules in Chapter 32 may be known as the Colorado Appellate Rules and shall be cited as "C.A.R.", followed by the number of the rule.

APPENDIX TO CHAPTER 32

**The Colorado
Appellate Rules**



APPENDIX TO CHAPTER 32

FORMS

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Form 1.

Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____		<p align="center">▲ COURT USE ONLY ▲</p>
THE PEOPLE OF THE STATE OF COLORADO In the Interest of : _____ [initials pursuant to § 19-1-109(1)] Minor Child(ren), And Concerning: _____ [initials pursuant to § 19-1-109(1)] Appellant/Respondent: _____		
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____		
Case Number: _____ Division _____ Courtroom _____		
NOTICE OF APPEAL (CROSS-APPEAL) AND DESIGNATION OF RECORD		

Notice is hereby given that _____ as counsel for _____ hereby ☐appeals ☐cross-appeals the order of ☐adjudication ☐disposition ☐termination entered by the trial court and all adverse rulings made therein. The trial court's order was reduced to writing, dated, and signed on _____ (date).

DESIGNATION OF RECORD

The clerk of the trial court will prepare the record on appeal, which shall include, pursuant to C.A.R. 3.4(e), the following items:

1. The trial court file, including all pleadings, motions, reports, exhibits, and orders of the court.
2. The original transcript of the following proceedings:

- ☐ The adjudicatory hearing held on _____ (date(s))
- ☐ The dispositional hearing held on _____ (date(s))
- ☐ The review hearing held on _____ (date(s))
- ☐ The permanency hearing held on _____ (date(s))
- ☐ The termination hearing held on _____ (date(s))

3. The name and address of the court reporter(s) is:

Name

Address

City State Zip Code

Name

Address

City State Zip Code

[or]

4. I need not order transcripts because: _____

5. I need not secure appellant's signature because: [See C.A.R. 3.4(d)] _____

Signature, attorney for appellant Date

Signature of appellant Date

CERTIFICATE OF MAILING

I certify that on _____ (date) the original of this *NOTICE OF APPEAL (CROSS-APPEAL) AND DESIGNATION OF RECORD* was filed with the trial court and Court of Appeals; and a true and accurate copy of this *NOTICE OF APPEAL (CROSS-APPEAL) AND DESIGNATION OF RECORD* was served on the other party(ies) and any court reporters listed above by placing it in the United States mail, postage pre-paid and addressed to the following:

Signature

Form 2.

Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____		▲ COURT USE ONLY ▲	
THE PEOPLE OF THE STATE OF COLORADO In the Interest of : _____ [initials pursuant to § 19-1-109(1)] Minor Child(ren), And Concerning: _____ [initials pursuant to § 19-1-109(1)] Appellant/Respondent: _____			
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____			Case Number: _____ Division _____ Courtroom _____
CERTIFICATE OF DILIGENT SEARCH			

1. I, _____, was counsel for _____ in the above-captioned case.
2. Since the time of entry of the order of: ☐ adjudication ☐ disposition ☐ termination, I have attempted to ascertain the whereabouts of my client:
☐ to discuss the merits of an appeal; ☐ to obtain his/her signature on the notice of appeal.
3. I have made the following efforts:
 - ☐ a. Sent a letter with proper postage affixed to the last-known address of my client and: ☐ received no response; ☐ the letter has been returned to me.
 - ☐ b. Ascertained through the post office in _____ that my client has not filed a forwarding address.
 - ☐ c. Telephoned my client with no response.
 - ☐ d. Checked with the _____ telephone company, and there is no new telephone listing on file for my client.
 - ☐ e. Undertaken the following additional inquiry into the whereabouts of my client:

4. I am unable to determine the whereabouts of my client.

I hereby certify that the above stated facts are true and correct.

Signature, attorney for appellant

Date

CERTIFICATE OF MAILING

I certify that on _____ (date) the original of this *CERTIFICATE OF DILIGENT SEARCH* was filed with the District Court; and a true and accurate copy of this *CERTIFICATE OF DILIGENT SEARCH* was served on the other party(ies) by placing it in the United States mail, postage pre-paid and addressed to the following:

Signature

Form 3.

Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____		▲ COURT USE ONLY ▲	
THE PEOPLE OF THE STATE OF COLORADO In the Interest of : _____ [initials pursuant to § 19-1-109(1)] Minor Child(ren), And Concerning: _____ [initials pursuant to § 19-1-109(1)] Appellant/Respondent: _____			
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____			Case Number: _____ Division _____ Courtroom _____
SUPPLEMENTAL DESIGNATION OF RECORD			

In addition to the transcripts designated by appellant, the clerk of the trial court shall include in the record on appeal:

1. The original transcripts of the following proceedings:
- a. _____ (List the name and the date of the proceeding.)
- b. _____ (List the name and the date of the proceeding.)

2. The name and address of the court reporter(s) is:

_____ Name	_____ Name
_____ Address	_____ Address
_____ City	_____ City
_____ State	_____ State
_____ Zip Code	_____ Zip Code
_____ Signature	
_____ Date	

CERTIFICATE OF MAILING

I certify that on _____ (date) the original of this *SUPPLEMENTAL DESIGNATION OF RECORD* was filed with the trial court and the Court of Appeals; and a true and accurate copy of this *SUPPLEMENTAL DESIGNATION OF RECORD* was served on the other party (ies) and the court reporter(s) by placing it in the United States mail, postage pre-paid and addressed to the following:

Signature _____

Form 4.

Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____		▲ COURT USE ONLY ▲
THE PEOPLE OF THE STATE OF COLORADO In the Interest of : _____ [initials pursuant to § 19-1-109(1)] Minor Child(ren), And Concerning: _____ [initials pursuant to § 19-1-109(1)] Appellant/Respondent: _____		
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____		
Case Number: _____ Division _____ Courtroom _____		
PETITION ON APPEAL		

1. This Petition on Appeal is filed on behalf of _____ (initials), the ☐ mother ☐ father ☐ child ☐ State ☐ Intervenor ☐ other _____ (initials), with respect to child(ren):

Child(ren)'s Initials

Date(s) of Birth

2. ☐ Parental rights were terminated by the trial court pursuant to § 19-3-604(1)(____), C.R.S. or
☐ The children were adjudicated dependent or neglected pursuant to §19-3-505, C.R.S., and a dispositional decree was entered pursuant to §§19-3-507 and 19-3-508, C.R.S.
3. Appellant's attorney, _____, ☐ is ☐ is not the attorney who represented appellant at trial.
4. Are there any other pending appeals involving the child (ren)? ☐ Yes ☐ No If Yes, list below:
 Case Name and Number: _____
 Type of Appeal: ☐ adjudication ☐ disposition ☐ dissolution
5. Relevant dates regarding this appeal are the following:

☐ D & N petition filed: _____

☐ Termination hearing: _____

☐ Adjudication order: _____

☐ Termination order: _____

☐ Disposition: _____

☐ Notice of Appeal filed: _____

☐ Permanency hearing: _____

☐ Other material hearing: _____

☐ Motion to terminate filed: _____

6. Nature of the case and relief sought: The appellant seeks reversal of the: ☐adjudicatory order.
☐dispositional decree. ☐order: ☐granting ☐denying termination.
7. State the material facts as they relate to the issues presented on appeal:

8. State the legal issues presented for appeal, including a statement of how the issues arose:

The issues statement should be concise in nature and set forth the specific legal questions. General conclusions, such as "the trial court's ruling is not supported by the law or the facts," are not acceptable. Include supporting legal authority for each issue raised.

Issue 1: _____

Supporting legal authority for Issue 1: _____

Issue 2: _____

Supporting legal authority for Issue 2: _____

(Additional issues may be added.)

The undersigned requests that the Court of Appeals issue an opinion reversing the order of the trial court in this matter, or, in the alternative, enter an order setting this case for full briefing.

Signature, attorney for appellant Date

ATTACHMENTS:

CERTIFICATE OF MAILING

I certify that on _____(date) the original and five copies of this *PETITION ON APPEAL* were filed with the Court; and a true and accurate copy of this *PETITION ON APPEAL* was served on the other party(ies) by placing it in the United States mail, postage pre-paid and addressed to the following:

Signature

Form 5.

Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____	
THE PEOPLE OF THE STATE OF COLORADO In the Interest of : _____ [Initials pursuant to § 19-1-109(1)] Minor Child(ren), And Concerning: _____ [Initials pursuant to § 19-1-109(1)] Appellant/Respondent: _____	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____	Case Number: _____ Division _____ Courtroom _____
RESPONSE TO PETITION ON APPEAL (CROSS-APPEAL)	

1. This Response to the Petition on Appeal is filed on behalf of _____ (initials), the ☐ mother ☐ father ☐ child
☐ State ☐ Intervenor ☐ other _____ (initials).

2. Appellee's attorney, _____, ☐ is ☐ is not the attorney who represented appellee at trial.

3. The relevant date(s) regarding this appeal:
 - ☐ Are correctly stated in the Petition on Appeal.
 - ☐ Are corrected by appellee as follows: _____

4. The statement of material facts as they relate to the issues presented for appeal are:
 - ☐ Accurate as set forth by appellant and accepted by the undersigned appellee.
 - ☐ Require additions/corrections as follows: _____

5. Appellee's response to the legal issues presented for appeal are as follows:
 - ☐ Response to Issue 1: _____

Legal authority for Issue 1 supporting appellee's response: _____

☐ Response to Issue 2: _____

Legal authority for Issue 2 supporting appellee's response: _____

(Additional responses to issues may be added.)

6. Are there any issues on cross-appeal ☐ Yes ☐ No If Yes, submit Petition on Appeal (Form 4 JDF 548).

The undersigned requests that the Court of Appeals affirm the order of the trial court in this matter.

Signature, attorney for appellee Date

CERTIFICATE OF MAILING

I certify that on _____ (date) the original and five copies of this *RESPONSE TO PETITION ON APPEAL (CROSS-APPEAL)* was filed with the Court; and a true and accurate copy of this *RESPONSE TO PETITION ON APPEAL (CROSS-APPEAL)* was served on the other party(ies) by placing it in the United States mail, postage pre-paid and addressed to the following:

Signature

Form 6.

Court of Appeals, State of Colorado 101 W. Colfax Avenue, Ste. 800 Denver, CO 80202 Name of Lower Court(s): _____ Trial Court Judges(s): _____ Case Number(s): _____ Appellant(s): v. Appellee(s):		<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorney or Party Without Attorney (Name and Address): _____ Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____		
Case Number: _____ Division _____ Courtroom _____		
CERTIFICATE OF COMPLIANCE		

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

- ☐ It contains _____ words.
☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

- ☐ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

 Signature of attorney or party

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CHAPTER 33

**The Colorado
Rules of Evidence**

Adopted by the
SUPREME COURT OF COLORADO

October 23, 1979

Effective January 1, 1980



ANALYSIS BY RULE

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CHAPTER 33

COLORADO RULES OF EVIDENCE

The Rules of Evidence are the product of six years of work by a select committee of the Colorado Bar Association, chaired by Professor Francis W. Jamison. The Rules parallel the Federal Rules of Evidence and the Uniform Rules of Evidence promulgated by the National Conference of Commissioners on Uniform State Laws. The drafting committee submitted the Proposed Rules to the Colorado Supreme Court and assisted in the presentation and complete review of the Rules at three public hearings.

ARTICLE I GENERAL PROVISIONS

Law reviews: For a discussion of recent Tenth Circuit decisions dealing with evidence, see 66 Den. U. L. Rev. 767 (1989); for articles, "Criminal Procedure" and "Evidence", which discuss recent Tenth Circuit decisions dealing with questions of evidence, see 67 Den. U. L. Rev. 701 and 739 (1990); for article, "Demonstrative Evidence: Coming of Age", see 22 Colo. Law. 1191 (1993); for article, "The Other Rules of Evidence", see 24 Colo. Law. 2169 (1995).

Rule 101. Scope

These rules govern proceedings in all courts in the State of Colorado, to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
(*Federal Rule Identical.*)

ANNOTATION

Applied in *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

Rule 103. Rulings on Evidence

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of evidence, the form in which it was offered, the objection

made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(*Federal Rule Identical.*)

Source: (a) amended and adopted June 20, 2002, effective July 1, 2002.

ANNOTATION

Law reviews. For article, "Preserving Issues for Appeal" discussing the requirement of an offer of proof, see 20 Colo. Law. 879 (1991). For article, "Preservation of Error Through the Use of Motions In Limine", see 24 Colo. Law. 781 (1995). For article, "Offers of Proof", see 31 Colo. Law. 85 (January 2002). For article, "C.R.E. 103(a) and Harmless Error", see 33 Colo. Law. 91 (November 2004).

Failure to object in the trial court on the grounds asserted on appeal is deemed to be a waiver of the objection. *People v. Watson*, 668 P.2d 965 (Colo. App. 1983); *People v. Girtman*, 695 P.2d 759 (Colo. App. 1984); *People v. Browning*, 809 P.2d 1086 (Colo. App. 1990); *People v. Renfro*, 117 P.3d 43 (Colo. App. 2004).

But a timely specific objection at trial preserves an evidentiary issue on appeal. *Hancock v. State*, 758 P.2d 1372 (Colo. 1988); *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997).

Ruling admitting evidence overturned only where prejudicial effect outweighs probative value. Only where the prejudicial effect of an evidentiary item outweighs its probative value will the trial court's evidentiary ruling admitting evidence be overturned as an abuse of discretion. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

A ruling that erroneously admits evidence requires reversal only when it affects a substantial right of the party against whom the ruling is made. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

In order to preserve for review an objection to the exclusion of evidence, a proper offer of proof must be made and must demonstrate that evidence is admissible as well as relevant to the issues in the case. *Melton By and Through Melton v. Larrabee*, 832 P.2d 1069 (Colo. App. 1992); *Vu v. Fouts*, 924 P.2d 1129 (Colo. App. 1996).

Motion in limine may constitute "timely objection" for purposes of this rule if it contains specific objections to the admission of specific items of anticipated evidence. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986).

An offer of proof to preserve for review an objection to the exclusion of evidence must demonstrate that evidence is admissible as well as relevant to the issues in the case. *Melton v. Larrabee*, 832 P.2d 1069 (Colo. App. 1992).

Defendant could not predicate error on trial court's denial of admission of hearsay evidence; since defendant made no offer of proof, it was not apparent from the context what the substance of the testimony would have been, and defense counsel made no objection to the denial. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

Subsection (a)(2) is applied in *Kedar v. Pub. Serv. Co.*, 709 P.2d 15 (Colo. App. 1985); *Silva v. Wilcox*, 223 P.3d 127 (Colo. App. 2009).

Evidentiary issues not brought to the attention of the trial court can only be considered under plain error standard. *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986).

Generally, an offer of proof should not be refused, since the purpose of such offer is to inform the trial court of what counsel expects to prove by the excluded evidence and to ensure that an appellate court will be able to evaluate the scope and effect of the ruling to determine whether the exclusion constituted reversible error. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Reversible error where trial court admitted summaries of hospital records into evidence where original records were not made available to defendant prior to trial. Summary evidence constituted majority of prosecution's case and its admission without proper foundation was prejudicial error. It deprived defendant of an accurate opportunity to challenge the accuracy of the summaries and to cross-examine the witness who presented the evidence. *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

Doctors' diagnoses, recited and summarized in administrative law judge decision, concerned the nature and extent of plaintiff's injuries, which were central issues in the case. Therefore their admission could not be consid-

ered harmless error. *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002).

No reversible error where trial court refused to allow defendant to present an offer of proof as to matters that were clearly not relevant, the nature of the evidence to be elicited was clearly shown by the record, and there was overwhelming evidence of defendant's guilt. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

No reversible error, where two letters were admitted into evidence over objection, but all substantive statements contained in letters had already been established at trial by properly admitted evidence. *Bunnett v. Smallwood*, 768 P.2d 736 (Colo. App. 1988), rev'd on other grounds, 793 P.2d 157 (Colo. 1990).

No reversible error where trial court refused to admit evidence on alleged negligent construction where no causal link between that construction and the creation of a fire hazard was established. *Melton By and Through Melton v. Larrabee*, 832 P.2d 1069 (Colo. App. 1992).

No reversible error where administrative hearing officer did not allow certain opinion testimony at teacher's disciplinary hearing where record reflects that, despite ruling, petitioner was permitted to present a substantial amount of character evidence and hearing officer concluded that petitioner was a person of good character. *Knowles v. Bd. of Educ.*, 857 P.2d 553 (Colo. App. 1993).

Appellate review of trial court's determination pursuant to § 13-25-129 regarding admissibility of child's hearsay statement should be based upon record made at in-limine hearing and may go beyond such record only if

issue of harmless error or plain error is raised. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

Reversal of a verdict on the grounds that the prevailing party violated an in limine evidentiary order is warranted only where the alleged violation of such order is clear. Where counsel stated in opening arguments that certain evidence would be excluded but did not reveal the details of the excluded evidence, there was no clear violation of the in limine order excluding such evidence. *Van Schaack v. Van Schaack Holdings, Ltd.*, 856 P.2d 15 (Colo. App. 1992).

Both the question whether claims should be bifurcated for trial and the issue whether otherwise competent evidence is relevant to the claim or defense presented are matters that rest within a trial court's sound discretion. A trial court's refusal to admit evidence will constitute grounds for reversal only if such refusal affects one of the party's substantial rights. *Arnold v. Colo. State Hosp.*, 910 P.2d 104 (Colo. App. 1995).

Applied in *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982); *People v. Shannon*, 683 P.2d 792 (Colo. 1984); *People v. Viduya*, 703 P.2d 1281 (Colo. 1985); *People v. Wafai*, 713 P.2d 1354 (Colo. App. 1985), aff'd, 750 P.2d 37 (Colo. 1988); *People v. Lucero*, 724 P.2d 1374 (Colo. App. 1986); *Banek v. Thomas*, 733 P.2d 1171 (Colo. 1986); *People v. Roybal*, 775 P.2d 67 (Colo. App. 1989); *Pyles-Knutzen v. Bd. of County Comm'rs*, 781 P.2d 164 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989); *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. 1993); *People v. Seacrist*, 874 P.2d 438 (Colo. App. 1993); *Iitin v. Bertrand T. Ungar, P.C.*, 17 P.3d 129 (Colo. 2000).

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivisions (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For comment, "Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties", see 79 U. Colo. L. Rev. 587 (2008).

The prosecution should be required to establish the foundational requirements for the admission of a co-conspirator's statement prior to any offer of the statement into evidence before the jury. *People v. Montoya*, 753 P.2d 729 (Colo. 1988).

A court's ruling on the admissibility of a co-conspirator's statement should normally be made during the presentation of the prosecution's case in chief, before the challenged statement is actually heard by the jury. *People v. Montoya*, 753 P.2d 729 (Colo. 1988).

There is no per se rule against conducting a child competency hearing in front of the jury, but the better practice is to excuse the jury. The defendant was not prejudiced by holding the hearing in front of the jury. *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

Judge, not jury, determines admissibility of evidence. The trial judge, rather than a jury, is the proper judicial functionary to determine the admissibility of evidence. *People v. Sanchez*, 180 Colo. 119, 503 P.2d 619 (1972).

The preponderance of evidence standard is the traditional standard applicable to the resolution of most preliminary questions of admissibility. *People v. Montoya*, 753 P.2d 729 (Colo. 1988); *People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992).

Whether inculpatory statements contained in a police officer's written statement were made and were made voluntarily is a preliminary matter to be decided by the judge under section (a). When evidence indicates that defendant signed a blank statement that was later filled in by the police officer, the court must first determine whether the defendant made the statements. *People v. Gay*, 24 P.3d 624 (Colo. App. 2000).

Even if the evidence is ruled inadmissible, the court has no authority to dismiss criminal charges solely upon the basis of its evidentiary ruling. *People v. Montoya*, 753 P.2d 729 (Colo. 1988).

The trial court determines the qualification of witnesses and has discretion to admit expert testimony. *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986); *People v. Williams*, 790 P.2d 796 (Colo. 1990).

Credibility of witnesses is for jury to determine, which may accept or reject all or part of a witness's testimony. *People v. Lewis*, 180

Colo. 423, 506 P.2d 125 (1973); *People v. Garner*, 187 Colo. 294, 530 P.2d 496 (1975).

It is the function of a jury to assess the credibility of witnesses. *People v. Saavedra*, 184 Colo. 90, 518 P.2d 283 (1974).

The credibility of the witnesses is a matter for the jury's determination. *People v. Hodge*, 186 Colo. 189, 526 P.2d 309 (1974); *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986).

It is axiomatic that the jury is the sole judge of the credibility of the witnesses. *People v. Barker*, 189 Colo. 148, 538 P.2d 109 (1975).

Weight to be given witnesses' testimony a matter for the jury's determination. Where a prima facie case is properly made, the jury is the trier of fact and the judge of the credibility of the witnesses and of the weight to be given their testimony. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972); *Duncan v. People*, 178 Colo. 314, 497 P.2d 1029 (1972).

Where there is no error in the court's initial ruling on the qualifications of a witness, his credibility and the weight to be given to his testimony is a jury question. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

The credibility of the witnesses and the weight to be given to their testimony is a matter for the jury's determination. *Salas v. People*, 181 Colo. 321, 509 P.2d 586 (1973); *People v. O'Donnell*, 184 Colo. 434, 521 P.2d 771 (1974).

It was within the province of the trial court to weigh the testimony of witnesses, including expert witnesses, in determining the factual question of whether the defendant was or was not hypnotized. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Where evidence is conflicting, it is function of the jury to determine truth. *Taylor v. People*, 176 Colo. 316, 490 P.2d 292 (1971).

It is the function of a jury to resolve conflicts in the evidence. *People v. Saavedra*, 184 Colo. 90, 518 P.2d 283 (1974).

It is the jury's function to weigh disputed evidence and to resolve the conflicts. *People v. Jiminez*, 187 Colo. 97, 528 P.2d 913 (1974).

Jury determines whether irreconcilable testimony requires corroboration. Where two versions are clearly irreconcilable, it is for the jury, not the judge, to determine whether the testimony of a witness requires corroboration. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

Error for court to strike blatantly inconsistent testimony. Where testimony is so blatantly inconsistent as to be unworthy of belief, it would be error for the trial court to strike the testimony on the ground that there are inconsistencies in the testimony, because the weight to be given the testimony, even though inconsis-

tent, is for the jury. *People v. Moreno*, 181 Colo. 106, 507 P.2d 857 (1973).

Policy behind section (b) is to allow some flexibility in the order of proof, in order to avoid undue delay and confusion. *People v. Lyle*, 200 Colo. 236, 613 P.2d 896 (1980).

In determining admissibility of other-crime evidence, trial court is required to consider all evidence in the case pursuant to subsection (a) of this rule. *People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Groves*, 845 P.2d 1310 (Colo. App. 1992).

Trial court erred in not admitting, as conditionally relevant evidence pursuant to section (b) of this rule, testimony of a wife as to admissions made by the wife's spouse about the fraudulent nature of his personal injury claim against his employer even though there was an issue about whether the admission was actually made by the spouse or based on the wife's dream. The proper analysis by the court in determining the admissibility of the wife's testimony should have been whether the jury could reasonably find by a preponderance of the evidence that the conditional fact, i.e. that the spouse made such statement, has been established. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

C.R.E. 602, requiring personal knowledge of a witness, is a specialized application of section (b) of this rule regarding conditionally relevant evidence. In a personal injury case by a husband against his employer, the question of whether the husband's spouse had personal knowledge as to the husband's admissions regarding the fraudulent nature of his claim was for the jury to determine in accordance with section (b) of this rule. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

Although the court precludes the admission of character evidence for the purpose of proving an act in conformance with such character, similar crime evidence is admissible for purposes of proving motive, opportunity, absence of mistake, or accident. *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992).

Prior to admission of the evidence permitted by section (b) of this rule, the court must be satisfied by a preponderance of the evidence that: (1) The evidence relates to a material fact; (2) the evidence is logically relevant

and tends to make the existence of the material fact more or less probable than it would be without the evidence; (3) its logical relevance is independent of the prohibited inference that the defendant was a bad character; and (4) its probative value outweighs the danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); *People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992); *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

Court's refusal to permit defendant to call prosecutor as witness not abuse of discretion where expected testimony related only to alleged discovery violations and not defendant's guilt or innocence. *People v. Perryman*, 859 P.2d 263 (Colo. App. 1993).

In absence of defendant's testimony the trial court must determine if there was a Miranda violation by weighing the credibility of witnesses. It is not a constitutional requirement that inconsistencies be resolved in the defendant's favor. *People v. Turtura*, 921 P.2d 40 (Colo. 1996).

Defendant's incriminating statements were obtained in violation of his Miranda rights, and trial court's order to suppress the statements was appropriate. A reasonable person in defendant's circumstances would have felt deprived of his or her freedom of action in a manner similar to a formal arrest. Therefore, defendant was in custody and subject to interrogation without being advised of his Miranda rights. *People v. Holt*, 233 P.3d 1194 (Colo. 2010).

Testing performed by Colorado bureau of investigation on listening device found in bar restroom did not alter the "character" of device and render it inadmissible in criminal eavesdropping prosecution but was simply a circumstance for jury to consider in weighing the evidence. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Trial court did not abuse its discretion by excluding testimony of defendant's sister because there were not sufficient guarantees of trustworthiness. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Applied in *Hendershott v. People*, 653 P.2d 385 (Colo. 1982); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Federal Rule Identical.)

ANNOTATION

Evidence properly admissible for one purpose does not become inadmissible because it would be inadmissible if offered only for another purpose. *Spencer v. People*, 163 Colo. 182, 429 P.2d 266 (1967); *Flore v. District Court*, 713 P.2d 840 (Colo. 1985).

Completeness rule. Where the admissible portion of a statement would be unfair or misleading without including the entire statement, the adverse party may introduce the other part of the statement. *People v. Melillo*, 976 P.2d 353 (Colo. App. 1998).

But both the rule of completeness and the concept of "opening the door" are subject to the considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

Judge should repeat limited-purpose instruction in written instructions in order to safeguard against potential misuse of other-crime evidence by the jury. *People v. Garner*, 806 P.2d 366 (Colo. 1991).

Trial court's failure to provide guidance to the jury as to the purpose of the evidence at the time it came in or at the close of the trial was abuse of discretion. *People v. Welsh*, 80 P.3d 296 (Colo. 2003).

Trial court did not abuse its discretion in finding that the probative value of the prosecution's psychiatrist's opinion, based in part on defendant's criminal history, was not substantially outweighed by the dangers of unfair prejudice. Defendant's criminal record was central to psychiatrist's antisocial personality disorder diagnosis. Furthermore, the parties had agreed that the court would instruct the jury to consider this evidence only as it related to defendant's insanity defense. Finally there were no particular facts to diminish the probative value of the evidence. *People v. Gonzales-Quevedo*, 203 P.3d 609 (Colo. App. 2008).

Applied in *O'Neal v. Reliance Mortg. Corp.*, 721 P.2d 1230 (Colo. App. 1986).

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For note, "Curative Admissibility: Fighting Fire With Fire", see 23 Colo. Law. 2321 (1994).

The purpose of this rule is to avoid creating a misleading impression by taking evidence out of context or otherwise creating a distorted picture by the selective introduction of evidence. *People v. Medina*, 72 P.3d 405 (Colo. App. 2003); *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

Completeness rule. Where the admissible portion of a statement would be unfair or misleading without including the entire statement,

the adverse party may introduce the other part of the statement. *People v. Melillo*, 976 P.2d 353 (Colo. App. 1998); *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

But both the rule of completeness and the concept of "opening the door" are subject to the considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

Applied in *People v. Wilson*, 841 P.2d 337 (Colo. App. 1992); *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999); *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

ARTICLE II JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(*Federal Rule Identical.*)

COMMITTEE COMMENT

This rule is identical to Rule 201 F.R.E. and generally codifies prior Colorado case law. *See* Nicholls v. Barrick, 27 Colo. 432, 62 P. 202 (1900) [courts take judicial notice of those matters which may be designated as “common knowledge”]; Finnerty v. Cook, 118 Colo. 310, 195 P.2d 973 (1948) [judicial notice of facts which are “universally known”]; Israel v. Wood, 93 Colo. 500, 27 P.2d 1024 (1933) [courts take judicial notice of matters of common knowledge in the community where they sit]; Bieser v. Stoddard, 73 Colo. 554, 216 P. 707 (1923) [well recognized natural and physical laws are judicially known and may not be put in issue by denial of their inevitable effect]; Winterberg v. Thomas, 126 Colo. 60, 246 P.2d

1058 (1952) [appellate courts will not hesitate to take judicial notice of the unquestioned laws of mathematics]. However, the mandatory nature of subsection (d) is a departure from existing practice.

In this rule judicial notice is limited to adjudicative facts which are those facts that can be readily determined by resort to accurate sources, such as a calendar date, *Sierra Mining Company v. Lucero*, 118 Colo. 180, 194 P.2d 302 (1948); term of public office, *People, ex rel. Flanders v. Neary*, 113 Colo. 12, 154 P.2d 48 (1944); or statistical charts, *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977).

ANNOTATION

Law reviews. For note, “Rule 201: The Use of Hearsay In Establishing Facts Sufficient for Judicial Notice”, see 22 Colo. Law. 2535 (1993). For article, “The Google Knows Many Things: Judicial Notice in the Internet Era”, see 39 Colo. Law. 19 (November 2010).

This rule is a codification of existing case law. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983).

This rule does not broaden the scope of judicial notice. *Larsen v. Archdiocese of Denver*, 631 P.2d 1163 (Colo. App. 1981).

This rule has traditionally been used cautiously in keeping with its purpose to bypass the usual fact-finding process only when the facts are of such common knowledge that they cannot reasonably be disputed. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983).

The court may take judicial notice of facts not subject to reasonable dispute because they are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned. A court may take judicial notice of the contents of court records in a related proceeding. *People v. Sa’ra*, 117 P.3d 51 (Colo. App. 2004).

Court may take notice without hearing. Under sections (c) and (f), the court may take

judicial notice while the case is under advisement without first giving the parties an opportunity to be heard. *People ex rel. Danielson v. Amity Mut. Irrigation Co.*, 668 P.2d 1368 (Colo. 1983).

Scientific propositions accepted as valid in the appropriate scientific community may be judicially noticed by an appellate court, acting on its own initiative. *Legouffe v. Prestige Homes, Inc.*, 634 P.2d 1010 (Colo. App. 1981), rev’d on other grounds, 658 P.2d 850 (Colo. 1983).

Classification of defendant’s past offense is a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged. *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

Conditions presenting risk not an adjudicative fact. Whether certain conditions in a negligence action present more than an ordinary risk of harm depends upon the circumstances of each case, and is not an adjudicative fact. *Larsen v. Archdiocese of Denver*, 631 P.2d 1163 (Colo. App. 1981).

Meaning of terms within context of constitution not subject to notice. In making its final legal conclusion about the meaning of terms

within the context of the constitution, the court should be free to accept or reject several relevant "legislative facts", such as the dictionary definitions of these terms, the use of these words in other cases, and the probable intent of the drafters of the constitution as indicated by any historical facts. These items, therefore, are not subject to the judicial notice rule. *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982).

For a court to be required to take judicial notice under this rule, it must, of necessity, be supplied with specific information that is the subject of the request. Otherwise, it is discretionary whether a court takes judicial notice. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986); *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060 (Colo. App. 1992).

Administrative law judge (ALJ) was not required to take judicial notice of the fact that doctor almost always testified for the defendant, based on a summary of court decisions in which same doctor had been a witness, even if court records were subject to judicial notice, unless the tribunal has been supplied with the specific facts, records, or documents that are the subject of the request. *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060 (Colo. App. 1992).

Rules published in the code of Colorado regulations are a fit subject for judicial notice. *Westfall v. Town of Hugo*, 851 P.2d 299 (Colo. App. 1993).

Pleadings, minutes, testimony, and verdict of a case in which defendant's friend was tried and acquitted is not a matter subject to judicial notice pursuant to this rule as it would require the trial court to second guess the fact finder in the other case as to its reasons for finding the person not guilty. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Judicial notice of municipal court order was proper. The fact that the court issuing the order was a municipal court was a matter of general knowledge within the district court's jurisdiction and it was capable of accurate con-

firmation through sources known to the district court. *People v. Merklin*, 80 P.3d 921 (Colo. App. 2003).

Rule regarding fact judicially noticed applies only to adjudicative facts and therefore the classification of a criminal defendant's offense which is a question of law, did not require instruction pursuant to this rule. *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992), *aff'd*, 876 P.2d 1236 (Colo. 1994).

Trial court erred in taking judicial notice of presentence report prepared by the probation department in determining whether defendant was previously convicted of a felony. *People v. Cooper*, 104 P.3d 307 (Colo. App. 2004).

The court did not err by taking judicial notice of defendant's probation status after determining the status from the state computer system. Since § 13-1-119 and Crim. P. 55 expressly approve of records kept and maintained in a state computer system, the court may take judicial notice of the court records contained in the system. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Magistrate in kinship adoption proceeding erred in taking judicial notice of guardian ad litem's report in mother's dissolution proceeding because mother did not have the opportunity to cross-examine guardian ad litem in the kinship proceeding. A court may not take judicial notice of facts on the issue the parties are litigating. However, a court may take judicial notice of its own records and adopt factual findings from a previous case involving the same parties and the same issues. In re C.A.B.L., 221 P.3d 433 (Colo. App. 2009).

Court did not err in not taking judicial notice of the dismissal of a previous sexual assault case when the defendant failed to comply with paragraph (d) of this rule and there was uncontroverted testimony that the case was dismissed. *People v. Marsh*, ___ P.3d ___ (Colo. App. 2011).

Applied in *Lovato v. Johnson*, 617 P.2d 1203 (Colo. 1980); In re House Bill 91S-1005, 814 P.2d 875 (Colo. 1991).

ARTICLE III PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMITTEE COMMENT

This rule is essentially identical to the Federal rule, thus achieving a desirable degree of uniformity and simplicity. The rule gives all of the proper traditional benefits of a presumption, but places no new burdens upon the opposing party. *See* House Report, p.7; Senate Report, p.

9; Joint Explanatory Statement of the Committee of Conference; *also* 1 Jones, *Evidence* § 3.6 (6th ed.); McCormick, *Evidence*, § 354 (2nd ed. 1972). *Contra*, *see* Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958).

ANNOTATION

Law reviews. For note, "Res Ipsa Loquitur — The Effect of Comparative Negligence", see 53 U. Colo. L. Rev. 777 (1982). For article, "Rule 301: Overcoming Presumptions", see 27 Colo. Law. 55 (January 1998).

Doctrine of res ipsa loquitur no longer creates a presumption of negligence which shifts the burden of disproving the presumed fact of negligence to the opponent of the presumption. The doctrine only shifts the burden of going forward with evidence to rebut the presumed fact of negligence. *Hartford Fire Ins. Co. v. Pub. Serv. Co.*, 676 P.2d 25 (Colo. App. 1983).

There is a presumption that adherence to the applicable standard of care adopted by a profession constitutes due care for those practicing that profession. The presumption, however, is a rebuttable one, and the burden is on the one challenging the standard of care to rebut the presumption by competent evidence. *United Blood Servs. v. Quintana*, 827 P.2d 509 (Colo. 1992).

Plaintiff was not required to bear the burden of going forward with evidence to rebut the presumed fact that compliance with indus-

try standards establishes "accepted good engineering practices" for purposes of tort liability since the fact that a defendant utility company complied with such practices is not dispositive of whether the utility was negligent in the activities which resulted in decedent's electrocution and since it is almost impossible for a plaintiff to present evidence to establish that compliance with industry standards was not, under the facts of a particular case, "accepted good engineering practice," that would rebut that presumption. *Yampa Valley Elec. v. Telecky*, 862 P.2d 252 (Colo. 1993).

Trial court committed reversible error in giving jury instruction, because there was no statutory or common law justification to support the rebuttable presumption contained in the instruction. *Yampa Valley Elec. v. Telecky*, 862 P.2d 252 (Colo. 1993).

Applied in *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980); *1st Charter Lease Co. v. McAL, Inc.*, 679 P.2d 114 (Colo. App. 1984); *People v. Gallegos*, 692 P.2d 1074 (Colo. 1984).

Rule 302. (No Colorado Rule Codified)

ARTICLE IV
RELEVANCY AND ITS LIMITS

Law reviews: For article, "Stretching Relevancy", see 22 Colo. Law. 1177 (1993).

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "The Admissibility of Hypnotically Refreshed Testimony in Criminal Cases", see 12 Colo. Law. 600 (1983). For article, "Discovery and Admissibility of Police

Internal Investigation Reports", see 12 Colo. Law. 1745 (1983). For casenote, "People v. Quintana: How 'Probative' Is This Colorado Decision Excluding Evidence of Post-Arrest Silence?", see 56 U. Colo. L. Rev. 157 (1984). For article, "Mythological Rules of Evidence", see 16 Colo. Law. 1218 (1987). For article,

"Hypnotically Refreshed Testimony in Trials — A New Approach", see 18 Colo. Law. 632 (1988). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002). For article, "The Admissibility of Evidence of the Pre-Trial Exercise of Constitutional Rights", see 37 Colo. Law. 81 (July 2008).

There is no qualitative difference between direct and circumstantial evidence. People in Interest of M.S.H., 656 P.2d 1294 (Colo. 1983).

Test for determining relevancy of real evidence is that such evidence must only be connected in some manner with either the perpetrator, the victim, or the crime. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. Carlson, 677 P.2d 390 (Colo. App. 1983).

As a general rule, facts which logically tend to prove or disprove the fact in issue or which afford a reasonable inference or shed light upon the matter contested are relevant. However, facts collateral to or bearing so remotely upon the issue that they afford only conjectural inference should not be admitted in evidence. People v. Botham, 629 P.2d 589 (Colo. 1981); People v. More, 668 P.2d 968 (Colo. App. 1983).

If evidence is relevant and material, its admission is not error merely because the evidence is cumulative. People v. Salas, 902 P.2d 398 (Colo. App. 1994).

An objection to the relevance of evidence does not include an objection that the evidence, if admissible, is unduly prejudicial under C.R.E. 403 because of the substantial difference in analysis trial courts perform under C.R.E. 403 and this rule. Am. Family Mut. Ins. Co. v. DeWitt, 216 P.3d 60 (Colo. App. 2008), *aff'd*, 218 P.3d 318 (Colo. 2009).

Nexus required for relevancy. Without a nexus between the deceased's prior violent acts and the actions of the defendant, the occurrence of these prior violent acts would be of no consequence in the determination of the guilt or innocence of the defendant. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (Colo. 1980).

Establishment of fact through use of negative allowed. Evidence is not irrelevant simply because it tends to establish a fact through the use of a negative. People v. Bueno, 626 P.2d 1167 (Colo. App. 1981).

When chain of custody necessary. Only where no single witness can establish the connection of evidence with the perpetrator, victim, or crime is an unbroken chain of custody of a specific item of evidence necessary in order to demonstrate relevancy. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather than the admissibility of evidence. People v. Gomez, 632 P.2d 586 (Colo. 1981); People v. Moltre, 893 P.2d 1331 (Colo. App. 1994).

Relevance of silence upon arrest. Evidence of a defendant's failure to make a statement to the arresting officers may be so ambiguous and lacking in probative value as to be inadmissible as substantive evidence. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Silence generally is thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Silence has probative value and may be admissible. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Defendant's non-responsiveness at crime scene and at hospital not properly admitted since defendant's defense of dissociative state did not rely on defendant's state of mind at hospital or crime scene and was therefore irrelevant to whether defendant was sane at the moment she shot the victim, and danger of unfair prejudice and likelihood of misleading the jury far outweighed any possible probative value that testimony regarding the defendant's silence might have had. People v. Welsh, 80 P.3d 296 (Colo. 2003).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. People v. Anderson, 637 P.2d 354 (Colo. 1981).

While voice-print analysis testimony may be relevant, it is not sufficiently reliable to be admissible. People v. Drake, 748 P.2d 1237 (Colo. 1988).

Hypnotically refreshed testimony is inadmissible. People v. Quintana, 659 P.2d 710 (Colo. App. 1982); People v. Rex, 689 P.2d 669 (Colo. App. 1984).

A jury's ability to observe a witness' demeanor and analyze a witness' ability to perceive, remember, and articulate is so hampered by the hypnotic process that the probative value of such evidence cannot overcome its flaws. People v. Quintana, 659 P.2d 710 (Colo. App. 1982).

From time of hypnosis forward. Testimony of a witness who has been questioned under hypnosis is per se inadmissible as to his recollections from the time of the hypnotic session forward. People v. Quintana, 659 P.2d 710 (Colo. App. 1982).

Recorded pre-hypnosis recollections admissible. However, the witness is not incompetent to testify to pre-hypnosis recollections that have previously been unequivocally disclosed and recorded by tape recording, video tape, or by written statement. People v. Quintana, 659 P.2d 710 (Colo. App. 1982).

Evidence gained from a hypnotic trance should be excluded. People v. Diaz, 644 P.2d 71 (Colo. App. 1981).

Evidence gained in hypnotic state held properly excluded. People in Interest of M.S.H., 656 P.2d 1294 (Colo. 1983).

Evidence relating to legal conclusions, and not to facts, properly excluded. Where the proffered evidence is relevant to the legal conclusion that the plaintiffs would like the courts to adopt, but not to the facts in issue, the evidence is properly excluded on relevancy grounds. *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982).

In a wrongful death action, evidence of the surviving spouse's remarriage is irrelevant in that the damages in this type of action are calculated at the time of the death, and remarriage is highly speculative as proof in mitigation of damages. *Barnhill v. Pub. Serv. Co.*, 649 P.2d 716 (Colo. App. 1982), *aff'd*, 690 P.2d 1248 (Colo. 1984); *Ford v. Bd. of County Comm'rs*, 667 P.2d 358 (Colo. App. 1983), *cert. dismissed*, 679 P.2d 579 (Colo. 1984).

Document excluded as irrelevant. People v. Mascarenas, 666 P.2d 101 (Colo. 1983).

Decedent's ability to accumulate wealth and loss of earning capacity in a certain business are relevant in a wrongful death action when a material part of the heir's net pecuniary loss is based on the loss of increase in her anticipated inheritance and the estimates and opinions presented were sufficiently grounded in fact to be admissible and probative on the issue of the decedent's earning capacity. *Ford v. Bd. of County Comm'rs*, 677 P.2d 358 (Colo. App. 1983), *cert. dismissed*, 679 P.2d 579 (Colo. 1984).

Death threat evidence inadmissible because it failed to show defendant's consciousness of guilt. *People v. Fernandez*, 687 P.2d 502 (Colo. App. 1984).

Evidence of a defendant's gang affiliation, which tended to prove the existence of a motive for killing the victim, was relevant where proof of intent to kill was a necessary part of the prosecution's case. *People v. Mendoza*, 860 P.2d 1370 (Colo. App. 1993).

Gang affiliation of defendant was evidence of proof of intent to kill and was relevant. The danger of prejudice did not outweigh its probative value. *People v. Mendoza*, 876 P.2d 98 (Colo. App. 1994).

Descriptions of defendant's clothing, which might be interpreted to imply a gang connection, held relevant and not unduly prejudicial where neither prosecutor nor witnesses used the word, "gang". *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Testimony that victim of sexual assault underwent counseling at the suggestion of the department of social services held relevant to the occurrence of the sexual assault. *People v. Myers*, 714 P.2d 513 (Colo. App. 1985).

Evidence of victim's rape fantasy and victim's statements regarding fantasy admissi-

ble under rape shield statute. The evidence and supporting statements should be admitted since the evidence and statements were material and relevant to the issue of consent. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Evidence of defendant's prior sexual relationship with victim subject to "prior sexual contact with actor" exception to rape shield statute. The evidence should be admitted since it is material and relevant to the issue of consent and supported defendant's theory of the case. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Evidence regarding poor health of theft victim's husband held relevant in light of the central issue of defendant's intention to permanently deprive victim of her money despite defendant's knowledge of the victim's circumstances. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999).

Evidence relating to conditions of release recommended by disposition committee of state hospital was relevant to issue of future dangerousness of defendant, an essential component of statutory test for eligibility for release, and, therefore, directly related to fact of consequence to determination of the action. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986).

Defense counsel characterized defendant who was alleged to have committed a sexual homicide as a "shy, quiet introvert, [an] immature child", therefore, pornographic pictures found in defendant's home were not admitted in error given that defendant was charged with crime involving mutilation of victim's genitalia and evidence of such photographs made it more likely that defendant had the knowledge requisite to perpetrate the mutilation. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd* on other grounds, 59 P.3d 979 (Colo. 2002).

Exclusion of testimony concerning commission of a crime by someone other than the defendant was proper, where it concerned a crime similar in character but remote in time from the crime charged. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

Evidence directly connecting an alternate suspect to the crime with which defendant is charged is not required to render admissible evidence that an alternate suspect committed a similar offense where there is an issue as to the identity of the perpetrator and the defendant desires to present alternate suspect evidence that bears on the issue, rather than merely showing motive or opportunity. *People v. Muniz*, 190 P.3d 774 (Colo. App. 2008).

If a reasonable fact finder could find that the facts pertaining to the purported alternate suspect create a reasonable doubt as to the identity of the perpetrator, the evidence should be admitted. Accordingly, the district

court abused its discretion in granting prosecution's motion in limine precluding defendant from presenting alternate suspect evidence. Because there was a reasonable probability that the exclusion of evidence prejudiced defendant, defendant's conviction must be reversed. *People v. Muniz*, 190 P.3d 774 (Colo. App. 2008).

In a sexual assault trial, because evidence of a victim's virginity spans such a lengthy period of time, it includes remote, non-probative evidence of lack of sexual activity and thus is too broad and over-inclusive to be admissible in light of its prejudicial effect. *Fletcher v. People*, 179 P.3d 969 (Colo. 2007).

Exclusion of irrelevant testimony offered in connection with a motion for a continuance. Trial court did not abuse its discretion by, denying a car dealer's motion for continuance in a car buyer's action against the dealer so as to secure the attendance of a witness whose testimony could not have affected the outcome of the trial and was irrelevant. *Jackson v. Rocky Mountain Datsun, Inc.*, 693 P.2d 391 (Colo. App. 1984).

Testimony by the personnel director concerning her personal knowledge of defendant's outbursts of temper, including one directed toward the corporate victim's president which resulted in defendant's firing, were admissible as tending to establish a motive for defendant to retaliate against the corporation with bomb threats which were the basis of the charge against defendant. *People v. Reaud*, 821 P.2d 870 (Colo. App. 1991).

Similar transaction evidence of whether the defendants engaged in a pattern or practice and a plan, scheme, or design in regard to the alleged fraud and violation of the Colorado Securities Act related to a material fact and the trial court erred in not allowing the plaintiffs to present such evidence where the probative value thereof was not substantially outweighed by the danger of unfair prejudice. *Munson v. Boettcher & Co., Inc.*, 832 P.2d 967 (Colo. App. 1991).

Admission of three weapons and holster not error since evidence was given connecting one of the weapons and holster to the robbery charged and since all weapons were similar to weapon used in robbery. *People v. Ridenour*, 878 P. 2d 23 (Colo. App. 1994).

Defendant's statements regarding killing of other persons that defendant made during murder were linked in time and circumstance to that criminal episode, formed a part of that criminal episode, and were admissible as *res gestae* evidence of the crime. *People v. Quintana*, 882 P.2d 1366 (Colo. 1994).

Evidence of defendant's prior drug dealing was properly admitted as *res gestae*. Detective's testimony explained to jury why police had set up drug buy with defendant. *People v. Gomez*, 211 P.3d 53 (Colo. App. 2008).

Certain additional irrelevant information on a proffered document was prejudicial and could have been excised from the document, so its admission constituted error, albeit harmless error in the instance. *Martin v. People*, 738 P.2d 789 (Colo. 1987).

In a driver's license revocation hearing, the reason for erratic driving is irrelevant to the issue of whether an officer has reasonable grounds to stop the vehicle. *Kollodge v. Charnes*, 741 P.2d 1260 (Colo. App. 1987).

Evidence that defendant promised to pay plaintiff's medical bills after plaintiff slipped and fell on a puddle of water on the defendant's premises, and then reneged on the promise, is not admissible. A reasonable juror could not believe that the fact that the defendant made the promise and later reneged makes it more probable that the plaintiff had mental anguish caused by the defendant's negligence, or increases the degree of that anguish flowing from such negligence. *Pennington v. Sears, Roebuck & Co.*, 878 P.2d 152 (Colo. App. 1994).

A proponent of evidence protected by the rape shield statute (§ 18-3-407) must still make an offer of proof as to the relevance of the evidence. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

Where probable cause to arrest or search is not at issue, it is improper to present to the jury evidence about obtaining an arrest or search warrant. Here, whether police had probable cause to arrest defendant was not at issue during the trial. The fact that the police believed they had enough evidence and that a judge found there was probable cause to arrest defendant had no rational tendency to prove that defendant committed the assault or that defendant was not justified in resisting the victim's use of force against him. Thus, admission of testimony concerning the arrest warrant was plain error. *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004).

The trial court's admission of the circumstances of the arrest to show consciousness of guilt was in error because the evidence did not show that the defendant was in flight or concealing himself to avoid arrest. The error, however, was harmless since there was overwhelming proof of the defendant's guilt. *People v. Summitt*, 132 P.3d 320 (Colo. 2006).

Applied in *Land v. Hill*, 644 P.2d 43 (Colo. App. 1981); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983); *People v. Hardy*, 677 P.2d 429 (Colo. App. 1983); *Danburg v. Realities, Inc.*, 677 P.2d 439 (Colo. App. 1984); *People v. McKeehan*, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988); *People v. Tippet*, 733 P.2d 1183 (Colo. 1987);

People v. Trefethen, 751 P.2d 657 (Colo. App. 1987); People v. Dunlap, 975 P.2d 723 (Colo.

1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado. Evidence which is not relevant is not admissible.

ANNOTATION

Law reviews. For article, "A Deposition Primer, Part II: At the Deposition", see 11 Colo. Law. 1215 (1982). For article, "The Admissibility of Hypnotically Refreshed Testimony in Criminal Cases", see 12 Colo. Law, 600 (1983). For casenote, "People v. Quintana: How 'Probative' Is This Colorado Decision Excluding Evidence of Post-Arrest Silence?", see 56 U. Colo. L. Rev. 157 (1984). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002).

Admissibility of relevant evidence. If evidence is relevant, it is admissible, unless its prejudicial effect outweighs its probative value. People v. Ortega, 672 P.2d 215 (Colo. App. 1983).

Determination of relevance within trial court's discretion. The determination of whether proffered evidence is relevant is within the sound discretion of the trial court; and, if the evidence has probative value in determining the central issue in dispute, the trial court's decision will not be reversed unless it is shown that there was an abuse of discretion. People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. Schwartz, 678 P.2d 1000 (Colo. 1984); People v. McKeehan, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993).

Defendant made no showing that his theory had attained the degree of reliability which would warrant its admission at trial and the determination here of whether the tendered testimony was relevant and not speculative were matters within the discretion of the trial court. People v. Wilson, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed. 2d 87 (1984).

It is within the special province and competence of the trial court to determine the relevance of evidence at trial. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

A trial court abuses its discretion in excluding relevant evidence only if it makes a decision that is manifestly arbitrary, unreasonable, or unfair. People v. McCoy, 944 P.2d 577 (Colo. App. 1996); People v. Harris, 43 P.3d 221 (Colo. 2002).

Trial court's discretion to determine relevancy is broad. People v. Gutierrez, 1 P.3d 241 (Colo. App. 1999).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather than the admissibility of evidence. People v. Gomez, 632 P.2d 586 (Colo. 1981); People v. Moltr, 893 P.2d 1331 (Colo. App. 1994).

Evidence properly excluded where it has no direct connection with charged crime. While evidence may be relevant to some degree concerning the defendant's theory that other persons committed the crime, it is properly excluded where it has no direct connection with the crime of which the defendant is charged. People v. White, 632 P.2d 609 (Colo. App. 1981).

Admission or exclusion of evidence of an experiment rests largely in the discretion of the trial court. People v. McCombs, 629 P.2d 1088 (Colo. App. 1981).

Conditions under which an experiment is conducted are required to be substantially similar to those existing at the time of the occurrence; however, this requirement does not render an experiment inadmissible because it is based on a disputed reconstruction of that crime. People v. McCombs, 629 P.2d 1088 (Colo. App. 1981).

Admission of allegedly prejudicial photograph not error if probative. Where an allegedly prejudicial photograph is probative with respect to a trial's pivotal issue, its admission into evidence is not error. People v. Harris, 633 P.2d 1095 (Colo. App. 1981).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. People v. Anderson, 637 P.2d 354 (Colo. 1981).

Hypnotically refreshed testimony is inadmissible. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982); People v. Rex, 689 P.2d 669 (Colo. App. 1984).

A jury's ability to observe a witness' demeanor and analyze a witness' ability to perceive, remember, and articulate is so hampered by the hypnotic process that the probative value of such evidence cannot overcome its flaws. Peo-

ple v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

From time of hypnosis forward. Testimony of a witness who has been questioned under hypnosis is per se inadmissible as to his recollections from the time of the hypnotic session forward. *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982).

Recorded pre-hypnosis recollections admissible. However, the witness is not incompetent to testify to pre-hypnosis recollections that have previously been unequivocally disclosed and recorded by tape recording, video tape, or by written statement. *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982).

Evidence gained from a hypnotic trance should be excluded. *People v. Diaz*, 644 P.2d 71 (Colo. App. 1981).

Evidence gained in hypnotic state held properly excluded. *People in Interest of M.S.H.*, 656 P.2d 1294 (Colo. 1983).

Admissibility of identification testimony. *People v. Gonzales*, 631 P.2d 1170 (Colo. App. 1981).

Use of alias to prove prior convictions and for sentencing as an habitual criminal is relevant to the crime charged. *People v. Talley*, 677 P.2d 394 (Colo. App. 1983).

Evidence of use of aliases is admissible if proof of an alias is relevant to an issue before the court. *People v. DeHerrera*, 680 P.2d 848 (Colo. 1984).

The court did not abuse its discretion in denying the defendant's motion for a mistrial on the basis that the court allowed cumulative evidence of the defendant's flight to be admitted into evidence. Even though the prosecution elicited testimony during cross-examination that the defendant was living under an assumed name, without establishing the relevance of the evidence as instructed by the court, the court issued a curative instruction to counter any unfair prejudice to the defendant. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Court did not err in failing to declare a mistrial sua sponte after expert witness gave opinion testimony as to the truth of child victim's allegation. A curative instruction is generally sufficient to overcome an evidentiary error and is insufficient only when the evidence is so prejudicial that, but for its exposure, the jury might not have found defendant guilty. *People v. Anderson*, 183 P.3d 649 (Colo. App. 2007).

To resolve an issue of relevancy, a court must determine whether proffered evidence relates to a fact that is of consequence to determination of action, whether evidence makes existence of a consequential fact more probable or less probable than it would be without such evidence, and whether probative value of evidence is substantially outweighed by danger of

unfair prejudice. *People v. Carlson*, 712 P.2d 1018 (Colo. 1986).

Alleged murder victim's statements made shortly after alleged perpetrator had beaten or threatened to kill the victim are admissible in a prosecution of the alleged perpetrator for murdering the victim. *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991).

Admission of statements by witnesses commenting on other witnesses' veracity not error where comments were elicited to explain police officers' investigative techniques and to rebut defense arguments. *People v. Davis*, ___ P.3d ___ (Colo. App. 2010).

Thermostat manufactured two years after the thermostat at issue that carried the same model number and functioned and operated the same way but that had a component part that was not crimped as was the one at issue was properly admitted into evidence against the manufacturer since it was admitted after the manufacturer's expert conceded in voir dire that the only significant difference was the absence of crimping, which, he testified, would not affect the high end of the temperature range. *Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993).

Log of the results of final inspections of thermostats of the same model as the one at issue that were manufactured from one year before the model at issue to three years after and that showed that, one year after, a lot of 200 thermostats had been rejected because the crimp was too big in the component part at issue was properly admitted into evidence against the manufacturer where the trial court concluded the log "cut both ways" because it showed not only that the manufacturer's quality control program had discovered the problem but also the potential for error in the manufacturing process. The court also concluded that the log would help the jury better understand the manufacturing process. *Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993).

Admission of three weapons and holster not error since evidence was given connecting one of the weapons and holster to the robbery charged and since all weapons were similar to weapon used in robbery. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

In sexual assault case, evidence of defendant's statements that "Mexicans were bred for sex" and Spanish-English dictionaries containing underlined words of a sexual and reproductive nature were relevant to issue of whether defendant knowingly caused submission of Mexican national victims. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

Evidence that defendant refused to consent to search of apartment was relevant and not unfairly prejudicial to impeach his testimony that he had not lived in the apartment for the last six days and did not know there were drugs

in the apartment. Evidence of refusal to consent to search could give rise to the reasonable inference that the defendant had dominion and control over the apartment. *People v. Chavez*, 190 P.3d 760 (Colo. App. 2007).

Evidence irrelevant where no logical relation to contested issues at trial. In arson case, underlying reasons for insurance company's refusal of coverage had no logical relation to any motive defendant may have had prior to fire nor probative of any elements of the crime charged and was irrelevant. *People v. Carlson*, 677 P.2d 390 (Colo. App. 1983), *aff'd*, 712 P.2d 1018 (Colo. 1986).

Testimony that defendant had been discharged from his job after the incident was inadmissible, since such act had no relevance to any contested issue. *People v. Jones*, 743 P.2d 44 (Colo. App. 1987).

Evidence of theft defendant's civil suit against victims was properly excluded as irrelevant where no prosecution witnesses were named parties in civil suit, and suit referred to dispute with victims at time defendant was discharged from victim's employment, and thus could not contradict or negate defendant's state of mind at time of commission of thefts. *People v. Stowers*, 728 P.2d 356 (Colo. App. 1986).

When admission of irrelevant evidence constitutes abuse of discretion and reversible error. Admission of irrelevant evidence is not necessarily reversible error. But where such evidence contributes to conviction of defendant, it is reversible error and abuse of trial court's wide discretion in determining relevancy of evidence. *People v. Carlson*, 677 P.2d 390 (Colo. App. 1983), *aff'd*, 712 P.2d 1018 (Colo. 1986).

Evidence excluded as irrelevant. *People v. Loscutt*, 661 P.2d 274 (Colo. 1983).

Although evidence of a defendant's compliance with applicable industry standards in a tort case is both relevant and admissible for purposes of determining whether the defendant either breached or satisfied the duty of care it owed to an injured plaintiff, such evidence is not conclusive on the issue of due care. *Yampa Valley Elec. v. Telecky*, 862 P.2d 252 (Colo. 1993).

Electrical utility was not entitled to a jury instruction creating a rebuttable presumption that adherence to industry standards presumes compliance with "accepted good engineering practice in the electric industry", since whether the utility complied with accepted good engineering practices, or whether it exercised due care is best determined by the jury after it has examined the relevant evidence and been properly instructed concerning the effect of the utility's compliance with the industry's minimum standards. *Yampa Valley Elec. v. Telecky*, 862 P.2d 252 (Colo. 1993).

Because property assessors are now constitutionally required to determine the actual or market value of property with an appraisal using the market approach, property tax assessments are relevant evidence of the value of real property. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

Applied in *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983); *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), *cert. denied*, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Admissibility of Governmental Studies to Prove Causation", see 11 Colo. Law. 1822 (1982). For article, "DNA: The Eyewitness of the Future", see 18 Colo. Law. 1333 (1989). For article, "Impeachment", see 22 Colo. Law. 1207 (1993). For article, "Adverse Inferences Due to Invocation of the Fifth Amendment", see 25 Colo. Law. 43 (March 1996). For article, "Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704", see 31 Colo. Law. 53

(March 2002). For article, "Polygraph Examinations: Admissibility and Privilege Issues", see 31 Colo. Law. 69 (November 2002). For article, "C.R.E. 403: The Balancing Test", see 33 Colo. Law. 41 (February 2004). For article, "The Admissibility of Evidence of the Pre-Trial Exercise of Constitutional Rights", see 37 Colo. Law. 81 (July 2008). For comment, "Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties", see 79 U. Colo. L. Rev.

587 (2008). For article, "The Expanding Use of the Res Gestae Doctrine", see 38 Colo. Law. 35 (June 2009).

To show an abuse of discretion for excluding relevant evidence, appellant must establish that the trial court's decision was manifestly arbitrary, unreasonable, or unfair. *People v. Gibbens*, 905 P.2d 604 (Colo. 1995); *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000); *People v. Perry*, 68 P.3d 472 (Colo. App. 2002); *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

When reviewing a determination under this rule for abuse of discretion, the appellate court must afford the evidence the maximum probative value attributable by a reasonable factfinder and the minimum unfair prejudice to be reasonably expected. *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000); *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

If evidence is relevant, it is admissible unless its probative value is outweighed by the countervailing factors of this rule. *Scognamiglio v. Olsen*, 795 P.2d 1357 (Colo. App. 1990); *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991).

Probative value of the evidence was substantially outweighed by the danger of unfair prejudice, because: (1) It explained how defendant became a suspect, an important point because, absent this explanation, the jury would be left to speculate as to how defendant became a suspect and because defendant's defense was mistaken identity; and (2) it showed the thoroughness of the police investigation and analysis, which was important since defendant's counsel had challenged the reliability of DNA analysis, partly by suggesting that the investigator was biased. Additionally, witness only mentioned the DNA databases briefly, and did not testify as to how the defendant's DNA profile came to be in the second database. Finally, no evidence was presented as to how any individual's DNA profile might come to be in either DNA database, and no evidence was presented that defendant had previously engaged in any criminal activity. Under the circumstances, any inference of prejudice was speculative. *People v. Harland*, 251 P.3d 515 (Colo. App. 2010).

In performing the C.R.E. 403 balance on review, the proffered evidence should be given its maximal probative weight and its minimal prejudicial effect. *People v. District Court of El Paso County*, 869 P.2d 1281 (Colo. 1994); *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

Colorado rules of evidence strongly favor the admission of evidence. The trial court has broad discretion in determining the admissibility of evidence, and the trial court's decision will only be reviewed for abuse of discretion. *People v. Medina*, 51 P.3d 1006 (Colo. App.

2001), *aff'd* on other grounds, 71 P.3d 973 (Colo. 2003).

"Unfair prejudice" should be construed to mean the prejudice from the proponent's evidence. Unfairly prejudicial evidence which may never be presented unless the defendant pursues it on cross-examination is not a sufficient basis to exclude otherwise admissible testimony. *People v. District Court of El Paso County*, 869 P.2d 1281 (Colo. 1994).

Rule was designed to permit trial courts the discretion of excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), *rev'd* in part on other grounds, 801 P.2d 536 (Colo. 1990).

An objection to the relevance of evidence does not include an objection that the evidence, if admissible, is unduly prejudicial under this rule because of the substantial difference in analysis trial courts perform under C.R.E. 401 and this rule. *Am. Family Mut. Ins. Co. v. DeWitt*, 216 P.3d 60 (Colo. App. 2008), *aff'd*, 218 P.3d 318 (Colo. 2009).

Trial courts are accorded considerable discretion in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997); *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000).

Defendant entitled to present evidence creating doubt as to guilt. A defendant is entitled to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt. *People v. Bueno*, 626 P.2d 1167 (Colo. App. 1981).

Evidence of similar transactions. Subject to this rule and the general rules of admissibility, evidence of similar transactions, when offered by the defendant, is admissible as long as it is relevant to the guilt or innocence of the accused. *People v. Bueno*, 626 P.2d 1167 (Colo. App. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982), appeal dismissed, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed. 2d 41 (1982).

In eminent domain valuation hearing concerning street condemned by department of highways, trial court properly admitted evidence of sales occurring after date of valuation as comparable sales where sales were sufficiently comparable in character, close in time, and in location to be probative of the value of the street and where the risk that the commissioners would be prejudiced, confused, or misled was slight. *State Dept. of Hwys. v. Town of Silverthorne*, 707 P.2d 1017 (Colo. App. 1985), cert. dismissed, 736 P.2d 411 (Colo. 1987).

When applying the liberal standard under C.R.E. 702 for determining the admissibility of scientific evidence, the court must also apply its discretionary authority under this rule to en-

sure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

While C.R.E. 401 and C.R.E. 402 reflect liberal admission of evidence, C.R.E. 403, in conjunction with C.R.E. 702, tempers broad admissibility by giving courts discretion to exclude expert testimony unless it passes more stringent standards of reliability and relevance. *People v. Martinez*, 74 P.3d 316 (Colo. 2003).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather than the admissibility of evidence. *People v. Gomez*, 632 P.2d 586 (Colo. 1981); *People v. Molter*, 893 P.2d 1331 (Colo. App. 1994).

Even though trial court did not consider whether evidence was unfairly prejudicial in ruling evidence was inadmissible, appellate court may consider whether it was unfairly prejudicial in determining whether trial court correctly determined the evidence was inadmissible. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

When evidentiary ruling overturned as abuse. Only where the prejudicial effect of an evidentiary item outweighs its probative value will the trial court's evidentiary ruling be overturned as an abuse of discretion. *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *People v. Durre*, 713 P.2d 1344 (Colo. App. 1985); *People v. Wells*, 754 P.2d 420 (Colo. App. 1987), rev'd on other grounds, 776 P.2d 386 (Colo. 1989).

Admissibility of photographs into evidence in a homicide prosecution is a matter within the discretion of the trial judge, who must weigh their probative value against their potential inflammatory effect on the jury; the trial judge's determination will not be disturbed on review absent an abuse of discretion. *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Dillon*, 633 P.2d 504 (Colo. App. 1981); *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983); *People v. Guffie*, 749 P.2d 976 (Colo. App. 1987).

The admission of a photograph of the dead victim for purposes of identification is not error solely because the defendant has stipulated to identity or because identity has been established through other witnesses. *People v. Viduya*, 703 P.2d 1281 (Colo. 1985).

The trial court has broad discretion in determining the admissibility of photographs. *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981).

Specific finding that probative value outweighs prejudicial effect not required. In admitting photographs into evidence in a criminal trial, a trial court need not specifically find that their probative value outweighs their prejudicial effect, as the alleged prejudice of photographic

evidence is equally susceptible to evaluation by an appellate court. *People v. Harris*, 633 P.2d 1095 (Colo. App. 1981).

Photographs are admissible to depict graphically anything a witness may have described in words, provided that the prejudicial effect of the photographs does not far outweigh their probative value. Photographs depicting the circumstances surrounding the victim's death, such as the appearance of the victim and the location and nature of the wounds, have probative value in a homicide case. *People v. Kurts*, 721 P.2d 1201 (Colo. App. 1986).

Photographs taken of nude child victim at morgue were properly admitted in vehicular homicide trial to show the nature and extent of victim's injuries, an issue plainly relevant to the jury's assessment of the recklessness of defendant's conduct. *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

Color photograph of murder victim at morgue, instead of black and white photograph, properly admitted to show trajectory of bullet through victim's head and because it was not particularly shocking or inflammatory in the context of a murder case. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Photographs of severed elk heads were admissible to identify elk shot by defendant. *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

Photographs are not inadmissible solely because defendant has stipulated to matters sought to be proven thereby, or because such matters have been established through witnesses' testimony. *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

Photographs of exhumed murder victim's body admissible as evidence explaining why it was difficult to determine the cause of death and why the coroner was unable to make conclusive findings. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), aff'd on other grounds, 71 P.3d 973 (Colo. 2003).

Videotape admissible where probative value outweighs unfair prejudice. *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986); *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Probative value of videotape showing defendant smoking drugs outweighed the unfair prejudice. The videotape's probative value that contradicted defendant's claim that he was not living in the house at the time of the evidence seizure was more probative than the prejudice of defendant smoking drugs particularly since there was other evidence introduced at trial regarding defendant's drug use to which defendant did not object. *People v. Warner*, 251 P.3d 567 (Colo. App. 2010).

Admission of victims' videotaped interview did not rise to the level of plain error where the victims and the official who had con-

ducted the interview testified at trial and they were subject to cross-examination. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997).

Mannequin used by prosecution to demonstrate how the victim was tied was not admitted as substantive evidence but was used only demonstratively. Testimony regarding the accuracy of such evidence must be given by a person having personal knowledge of the scene depicted, may not be based on hearsay statements, and is subject to cross-examination. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Police officers did not "vouch for" truthfulness of child rape victim by relating her statements following the crime. Therefore, no prejudice to defendant resulted from court's admission of their testimony. *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

Trial court neither abused its discretion nor violated defendant's right to confrontation where defendant was prohibited from revealing to jury through cross-examination that witness was in custody in another state on unrelated charges where such testimony would have been cumulative and of little or no probative value and where defendant was otherwise provided with ample opportunity to impeach the witness' credibility by showing ulterior motive. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993).

Court did not abuse its discretion by excluding evidence of previous miscarriage as unduly prejudicial. The court had well founded concerns that evidence of a miscarriage could make the victim appear promiscuous and divert the jury's attention. As well, the exclusion did not prevent or hamper the defendant from presenting a theory of the case. *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

Trial court's ruling not disturbed unless discretion abused. Unless an abuse of discretion is shown, the trial court's ruling on the admissibility of photographs into evidence will not be disturbed on review. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Young*, 710 P.2d 1140 (Colo. App. 1985); *Williamsen v. People*, 735 P.2d 176 (Colo. App. 1987); *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. App. 1990); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990); *People v. Fasy*, 813 P.2d 797 (Colo. App. 1991); *Campbell v. People*, 814 P.2d 1 (Colo. App. 1991); *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. App. 1993).

Only if a trial court abuses its discretion in excluding evidence, and such exclusion affects a party's substantial rights, will such exclusion provide the basis for a reversal of the court's judgment. Exclusion of evidence affects a substantial right of a party only if it can be said with fair assurance that the error influenced the outcome of the case or impaired the basic fairness

of the trial itself. *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10 (Colo. App. 1996).

In exercising such discretion, a trial court must consider the probative value of the proposed evidence, the nature of the offered evidence, and the other evidence admitted during trial. *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10 (Colo. App. 1996).

Photographs are not rendered inadmissible merely because they reveal shocking details of a crime. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

For evidence of experiment to be admissible it must aid rather than confuse the jury in its resolution of the issues, and it must tend directly to establish or disprove a material issue in the case. *People v. McCombs*, 629 P.2d 1088 (Colo. App. 1981).

Trial court properly excluded evidence when it determined that the excluded testimony could confuse the issues, mislead the jury, and open the door to cross-examination concerning collateral issues. *People v. Watkins*, 83 P.3d 1182 (Colo. App. 2003).

The admission or exclusion of evidence of an experiment rests largely in the discretion of the trial court. An experiment is not rendered inadmissible solely because it is based on a disputed reconstruction of the crime. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998).

Witness may be required to demonstrate trigger pull on gun before jury if the probative value of such evidence outweighs any prejudicial effect. Any prejudice flowing from defendant's demonstration of trigger pull was ameliorated by his explanation at trial and the cast on his hand that was visible to the jury. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998).

Evidence of routine practice. The trial court has the discretion to exclude evidence of a routine practice if its probative value is substantially outweighed by the danger of unfair prejudice. *Bloskas v. Murray*, 646 P.2d 907 (Colo. App. 1982).

The trial court is vested with broad discretion in determining relevancy. *Melton By and Through Melton v. Larrabee*, 832 P.2d 1069 (Colo. App. 1992).

The testimony of a severely injured plaintiff and his guardian in a declaratory judgment action to determine the issue of coverage under an insurance policy would be prejudicial to the defendant and would constitute an effort to evoke sympathy. Accordingly, the trial court was well within its discretion in finding such testimony of minimal probative value with respect to the issues involved in the case. *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375 (Colo. App. 1996).

Trial court erred in excluding expert testimony as to heat of fire where it was directly related to determining plaintiff's pain and suf-

ferring damages as a result of the accident. *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Evidence that defendant left restaurant upon seeing witness was not irrelevant or prejudicial. *People v. Trujillo*, 686 P.2d 1364 (Colo. App. 1984).

Evidence of a defendant's flight may be relevant to show consciousness of guilt but only if it can be shown the defendant was aware he or she was being sought. *People v. Perry*, 68 P.3d 472 (Colo. App. 2002).

Prejudice of prior criminality outweighed by probative value. Defendant's activities at a halfway house were probative of his guilt or innocence despite the prejudicial aspects of his residence at the halfway house. *People v. Clark*, 705 P.2d 1017 (Colo. App. 1985).

The probative value of Pennsylvania sexual assault was not outweighed by the danger of unfair prejudice. It had legitimate probative force since the Pennsylvania sexual assault was similar in important respects to the charged offense. *People v. Everett*, 250 P.3d 649 (Colo. App. 2010).

Evidence of plaintiff's status as an undocumented immigrant was clearly relevant to the issue of damages for lost future earnings, but the admissibility of such evidence would depend on whether plaintiff had violated the immigration laws or an employment-related rule and was unlikely to remain in the United States during the period of lost future wages. *Silva v. Wilcox*, 223 P.3d 127 (Colo. App. 2009).

Since stipulation by defendant would carry same probative weight as that of proffered evidence, its only remaining effect was to present irrelevant and prejudicial evidence. In this instance, its admission was harmless error. *Martin v. People*, 738 P.2d 789 (Colo. 1987).

Trial court may require the acceptance of a stipulation of fact made by the defendant if the people's case is not weakened by such stipulation and if the probative value of the offered evidence is substantially outweighed by the danger of unfair prejudice. *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987).

Trial court did not abuse its discretion in admitting community corrections tracking records even though defendant's proffered stipulation carried equal probative force. The court acted to remove any unfair prejudice by requiring the prosecution to avoid any inference that defendant was in custody. *People v. St. James*, 75 P.3d 1122 (Colo. App. 2002).

Probative value of conditions of release recommended by disposition committee of state hospital was not substantially outweighed by unfair prejudice, confusion of issues, or misleading jury, or any of the other factors in this rule. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986).

Because defendant was willing to stipulate to the mental state element of the offense which the prosecution was required to prove, there was no material fact in dispute and the probative value of introducing evidence of defendant's prior misdemeanor conviction resulting from an altercation would be minimal weighed against the danger of unfair prejudice. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Death threat evidence inadmissible because it failed to show defendant's consciousness of guilt. *People v. Fernandez*, 687 P.2d 502 (Colo. App. 1984).

Evidence of a safety code or regulation in effect at the time of alleged negligence may be admissible in some circumstances, however, codes and regulations enacted after alleged negligence may result from research conducted, information obtained, impracticalities eliminated or mitigated, or even a consensus formed, after the alleged negligence; therefore, such codes and regulations do not ordinarily give a similar indication of the duty of care years before their enactment. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

Where evidence presented at trial did not support plaintiff's offer of proof that compliance with a regulation enacted after the alleged negligence occurred would have led to the discovery of a leak before an explosion, evidence concerning the regulation was not admissible to establish the standard of care prior to the enactment of the regulation. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

Cumulative evidence. The admission or rejection of cumulative evidence is within the trial court's discretion and its ruling will not be overturned unless an abuse of discretion clearly appears. *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983).

Cumulative evidence may be excluded by the trial court. *Danburg v. Realities, Inc.*, 677 P.2d 439 (Colo. App. 1984); *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992); *People v. Salas*, 902 P.2d 398 (Colo. App. 1994).

There was no threat of a needless presentation of cumulative evidence where testimony was the only evidence presented as to heat of the fire which was directly related to determining plaintiff's pain and suffering damages as a result of the accident. *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Where evidence to which defendant objected consisted of previous testimony that had already been admitted at trial and no one else had the information that the witness possessed, except defendant, the evidence itself was not cumulative. *People v. Balkey*, 53 P.3d 788 (Colo. App. 2002).

Since the testimony had already been once received, its repetition to the jury during its deliberations was not "needless" within the meaning of the rule. *People v. Balkey*, 53 P.3d 788 (Colo. App. 2002).

It was not an abuse of discretion for the trial court to exclude written reports of the property's fair market value where two experts were examined at trial concerning their opinion of the property's fair market value, the factors they considered, and the methods they employed and the reports merely reiterated their testimony. *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).

It was not an abuse of discretion for the trial court to exclude victim's inconsistent statements concerning use of marijuana prior to assault where such evidence would have been cumulative of other testimony impeaching the victim and such evidence was potentially prejudicial to both parties. *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994).

Testimony of several prosecution witnesses providing similar testimony did not undermine the fairness of the trial or cast serious doubt on the reliability of the verdict where the trial court instructed jurors that they were to determine the weight and credit to be given to the victims' out-of-court statements and that the number of witnesses testifying on a particular issue was irrelevant in weighing the strength of the evidence. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997).

The test to apply in determining whether an accused may offer evidence that another committed the crime for which the defendant is being tried is that the defendant must first offer proof directly connecting the third person with the crime before evidence of that person's opportunity or motive to commit the crime becomes admissible. *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977); *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

In the context of child abuse prosecution, the fact that the victim was in custody of the third person during the time when the injury could have been inflicted is sufficient direct and circumstantial evidence to satisfy the test. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

If a prior act indicates no aspect of intent that cannot be discerned from the act in the crime charged, there is no valid purpose for admission of the prior act evidence to prove intent, and its probative value is outweighed by its prejudicial effect. *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985).

Evidence of refusal to take a blood or breath test is admissible in evidence at a revocation of license proceeding or at a trial for driving under the influence or while ability impaired, and the effect of § 42-4-1202 (3)(e) is to allow admission of such evidence in every case without a determination of relevance on a

case-by-case basis. *Cox v. People*, 735 P.2d 153 (Colo. 1987).

Probative value of battered woman opinion evidence was not outweighed by unfair prejudicial effect. The opinion evidence admitted was relevant to the issue of the victim's credibility, and the expert did not testify regarding the specific relationship between the defendant and the victim. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

Evidence of incest victim psychology held admissible and probative value not outweighed by prejudicial effect. *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986).

Evidence protected by the rape shield statute (§ 18-3-407) falls under a presumption that a victim's or witness' sexual conduct is irrelevant unless the proponent of the evidence shows that it is relevant to a material issue in the case. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

In a sexual assault trial, because evidence of a victim's virginity spans such a lengthy period of time, it includes remote, non-probative evidence of lack of sexual activity and thus is too broad and over-inclusive to be admissible in light of its prejudicial effect. *Fletcher v. People*, 179 P.3d 969 (Colo. 2007).

A trial court may consider the policy concerns underlying the rape shield statute when weighing the relevance of evidence of a victim's or witness' sexual conduct against its potentially prejudicial effect. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

Trial court did not abuse its discretion by admitting into evidence tape recorded conversation involving father accused of incest against his son, the boy, and the boy's mother where the question of whether either the mother's or father's influence over the child may have accounted for the child's vacillations and recantations in making the allegations was a central issue. *People v. Gibbens*, 905 P.2d 604 (Colo. 1995).

Court did not abuse its discretion in admitting evidence of defendant's other sex assaults. The evidence was relevant to show defendant's intent and motive. *People v. Orozco*, 210 P.3d 472 (Colo. App. 2009).

Evidence of consensual sexual contact with one other than the victim, which took place in the same place and at about the same time as alleged sexual assault on child, held relevant and not unduly prejudicial. *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993).

Probative value of evidence in sexual assault case did not substantially outweigh danger of unfair prejudice where evidence consisted of defendant's statements that "Mexicans were bred for sex" and Spanish-English dictionaries containing underlined words of a sexual and reproductive nature. *People v. Braley*, 879 P.2d 410 (Colo. 1993).

Admitting evidence of victim's rape fantasy and evidence of defendant and victim's prior sexual relationship not unfairly prejudicial. The probative value of the evidence outweighs the prejudice the victim may suffer as a result. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Prejudice of threat outweighed by probative value. A letter from defendant to a fellow prisoner, containing an admission of a fact relevant to proof of his guilt of the crime charged and containing a threat against the fellow prisoner, is admissible to show a consciousness of guilt despite the prejudicial aspects of the included threat. *People v. Lowe*, 660 P.2d 1261 (Colo. 1983).

Defendant's statement to polygraph examiner was admissible because it was relevant to ultimate issue in case and prejudicial impact was minimal. *People v. Robinson*, 713 P.2d 1333 (Colo. App. 1985).

The admission of cumulative hearsay statements of child victim of sexual assault proper where truthfulness of child victim was at issue and statements were, therefore, relevant to material issues in the case. *People v. Morrison*, 985 P.2d 1 (Colo. App. 1999), *aff'd* on other grounds, 19 P.3d 675 (Colo. 2000).

Trial court erred in precluding defendant from inquiring into, and if necessary, presenting evidence of, a romantic relationship between alleged victim and a friend. Evidence of alleged victim's romantic and sexual relationship with friend was relevant to a material issue in the case, namely, victim's motive to lie. Trial court's exclusion of the motive evidence infringed upon defendant's constitutional right to confront witnesses. *People v. Owens*, 183 P.3d 568 (Colo. App. 2007).

The probative value of a prior conversation between the victim and the defendant in the same setting as the alleged assault is not substantially outweighed by any danger of unfair prejudice that may result from the admission of the conversation, which is, arguably, not even evidence of defendant's bad character. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Damage to defendant's case not grounds for exclusion. The trial court should not exclude proffered evidence as unfairly prejudicial simply because it damages the defendant's case. All effective evidence is prejudicial in the sense of being damaging or detrimental to the party against whom it is offered. *People v. District Court*, 785 P.2d 141 (Colo. 1990).

Where the evidence is admissible under § 13-25-129, defendant must show some basis for refusing the evidence beyond conclusory statements that the evidence was prejudicial and cumulative. *People v. Fasy*, 813 P.2d 797 (Colo. App. 1991).

Only prejudice which suggests a decision made on an improper basis, such as the jury's bias, sympathy, anger, or shock, requires the exclusion of evidence under this rule. Evidence should not be excluded simply because it damages the defendant's case. *People v. Salas*, 902 P.2d 398 (Colo. App. 1994).

The danger of prejudice presented by the evidence of the defendant's gang membership did not outweigh its probative value where the evidence was not offered to prove that the defendant was more likely to kill because he was a gang member; rather it was offered to show that, because of his membership in a particular gang, defendant was more likely to murder this particular victim after deliberation. *People v. Mendoza*, 860 P.2d 1370 (Colo. App. 1993).

The prejudice to the defendant, if any, because of the prosecutor's statements during closing arguments that the "Bloods and Crips do not get along peaceably" was not so substantial as to warrant a mistrial where the nature of the relationship between the two gangs was germane to the prosecutor's theory of the case and sufficient evidence illustrating the relationship had been introduced at trial to support the prosecutor's statements. *People v. Mendoza*, 860 P.2d 1370 (Colo. App. 1993).

Prejudicial proffered evidence outweighed by probative value. Proffered evidence which calls for exclusion as unfairly prejudicial is given a more specialized meaning of an undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution or horror. *People v. District Court*, 785 P.2d 141 (Colo. 1990); *Holley v. Huang*, — P.3d — (Colo. App. 2011).

The fact that a witness is a member of a gang which is loyal to the defendant's gang is probative of bias and is admissible so long as it does not unduly prejudice the defendant. *People v. Trujillo*, 749 P.2d 441 (Colo. App. 1987).

The fact that the defendant's expert witness had a "substantial connection" with the defendant's insurer is probative of bias, and admission of evidence of such connection was within the trial court's discretion. *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. *People v. Anderson*, 637 P.2d 354 (Colo. 1981).

Descriptions of defendant's clothing, which might be interpreted to imply a gang connection, held relevant and not unduly prejudicial where neither prosecutor nor witnesses used the word "gang". *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

The trial court did not abuse its discretion in admitting into evidence portions of a vid-

eotaped statement defendant made to the police in which he denied an accusation that he told others that he intended to kill the victim and acknowledged that he had had three prior lovers who had died and that the victim was aware of that, where there was substantial evidence that the defendant had manifested an intent to kill the victim, the defendant made no admission of guilt regarding the deaths of his former lovers, the comments were not mentioned or highlighted by either the court or the prosecution, and no reference was made to them during the examination of witnesses or during the prosecution's opening or closing statements. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

Trial court did not abuse discretion in not admitting "other acts" evidence when admission of evidence would have consumed a great deal of trial time and would have had slight probative value. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Where a witness was temporarily unable to testify in court and the probative value of her relevant testimony was reduced by the delay in time between the witness's observations and the criminal act, the discrepancies between the witness's and victim's descriptions of the vehicle involved, and the witness's admission that she could not see clearly because she was not wearing her glasses, the trial court did not abuse its discretion in ruling that the minimal probative value of the witness's testimony was outweighed by the delay of a continuance or relocation of the trial to the witness's home. *People v. Webster*, 987 P.2d 836 (Colo. App. 1998).

No abuse of discretion in admitting evidence of defendant's deferred judgment for burglary. *People v. Nunez*, 973 P.2d 1260 (Colo. 1999).

Evidence of defendant's prior domestic violence conviction was properly admitted. The conviction was relevant for impeachment purposes and was not prejudicial since it was a single, isolated, brief statement that was not a significant part of the prosecution's cross-examination or closing argument. *People v. Sommers*, 200 P.3d 1089 (Colo. App. 2008).

No abuse of discretion in admitting police officers' testimony about prior contact with defendant and defendant's area restriction. Testimony was part of the *res gestae* of the offense because it gave the jury an understanding of why defendant was stopped and thus formed a natural and integral part of an account of the crime. Likewise, testimony about an outstanding misdemeanor arrest warrant was relevant because it described the chain of events preceding defendant's arrest and explained why he was taken into custody. The officers did not testify about the nature of the prior contact or the nature of the area restriction; thus, this tes-

timony was neither unduly inflammatory nor likely to prevent the jury from making a rational decision. Although this testimony may have been damaging to defendant, it did not amount to unfair prejudice. *People v. Asberry*, 172 P.3d 927 (Colo. App. 2007).

Evidence of defendant's prior drug dealing was properly admitted as *res gestae*. Detective's testimony explained to jury why police had set up drug buy with defendant. *People v. Gomez*, 211 P.3d 53 (Colo. App. 2008).

No abuse of discretion for admitting false identification evidence when court found false ID card was relevant to issues of defendant's flight, consciousness of guilt, fluency in English, and expertise with law enforcement. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

Evidence impugning moral character excluded. Evidence excluded as violating standard principles of evidence by needlessly impugning moral character. *People v. Loscutt*, 661 P.2d 274 (Colo. 1983).

The trial court has broad discretion to preclude inquiries that have no probative force or are irrelevant or have little bearing on the witness's credibility but would substantially impugn his character. *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986).

Evidence regarding defendant's gang affiliation properly admitted. Defendant's gang affiliation could have shown a motive to commit the crime. *People v. Moya*, 899 P.2d 212 (Colo. App. 1994).

Evidence of a defendant's gang involvement was limited to testimony of his statement to police that he had been involved in gang activities and that statement was offered in support of the prosecution's theory that the shooting was motivated by gang rivalry, therefore the trial court did not abuse its discretion in ruling that the testimony was not unfairly prejudicial. *People v. Webster*, 987 P.2d 836 (Colo. App. 1998).

Evidence of defendant's jealousy and accusatory behavior was admissible as *res gestae* evidence because challenged testimony was part and parcel of the criminal episode for which defendant was charged. Trial court did not abuse its discretion by denying defendant's motion for a mistrial. *People v. Jaramillo*, 183 P.3d 665 (Colo. App. 2008).

Evidence of threats against a witness properly admitted. The evidence could show consciousness of guilt and, by inference, that the defendant committed the crime charged. *People v. Eggert*, 923 P.2d 230 (Colo. App. 1995).

Evidence of a witness's fear of retaliation is admissible to explain the witness's change in statement or reluctance to testify. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Evidence regarding poor health of theft victim's husband held relevant in light of the

central issue of defendant's intention to permanently deprive victim of her money despite defendant's knowledge of the victim's circumstances. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999).

Statement of defendant that her multiple personality disorder had been cured by the time of the murder properly admitted. Statement had probative value, given the prosecution's theory that defendant had covered up her involvement in the crime, and defendant's description of her mental state at the time of the offense made it more probable that she had intentionally caused the death of the victim. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Evidence that defendant refused to consent to search of apartment was relevant and not unfairly prejudicial to impeach his testimony that he had not lived in the apartment for the last six days and did not know there were drugs in the apartment. Evidence of refusal to consent to search could give rise to the reasonable inference that defendant had dominion and control over the apartment. *People v. Chavez*, 190 P.3d 760 (Colo. App. 2007).

Defendant's nonresponsiveness at crime scene and at hospital not properly admitted since defendant's defense of dissociative state did not rely on defendant's state of mind at hospital or crime scene and was therefore irrelevant to whether defendant was sane at the moment she shot the victim, and danger of unfair prejudice and likelihood of misleading the jury far outweighed any possible probative value that testimony regarding the defendant's silence might have had. *People v. Welsh*, 80 P.3d 296 (Colo. 2003).

Video animation was properly admitted in shaken baby syndrome prosecution because it related to expert's opinion regarding the manner in which shaken baby syndrome injuries occur and it was included because trial court specifically rejected defendant's claim that the video was extremely violent and therefore unfairly prejudicial. *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001).

Evidence concerning possible penalties faced by witness for his part in burglary excluded. Court did not err in excluding evidence concerning possible penalties faced by informer which defendant argued was relevant to show informer had motive to shift blame for crime to defendant. *People v. Pinkey*, 761 P.2d 228 (Colo. App. 1988).

Documents excluded as irrelevant. *People v. Walker*, 666 P.2d 113 (Colo. 1983).

Expert testimony permitted. *People v. Gordon*, 738 P.2d 404 (Colo. App. 1987).

Propounding questions with no reasonable basis in fact for the interrogation. Defense counsel may not properly propound to a witness questions which can cause a doubt in the jury's mind as to the witness' credibility when there is

no reasonable basis in fact for that interrogation. Under this rule and § 18-3-407, the defendant held not to have established entitlement to elicit the name of the male whom the child sexual assault victim allegedly had intercourse with days before the date of the sexual assault. *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

Polygraph evidence inadmissible. If the defendant's statements made to the polygraph technician are edited to remove all reference to the polygraph examination, they will not be characterized by the unfair prejudice required to make evidence excludable. *People v. District Court*, 785 P.2d 141 (Colo. 1990).

Evidence of a defendant's offer or willingness to take a polygraph examination is per se inadmissible as evidence of consciousness of innocence. *People v. Muniz*, 190 P.3d 774 (Colo. App. 2008).

In determining the admissibility of expert testimony on the reliability of eyewitness testimony, the court should issue written findings of fact applying both the helpfulness standard of C.R.E. 702 and the discretion granted under this rule. *Campbell v. People*, 814 P.2d 1 (Colo. 1991).

Trial court erred in excluding expert testimony on reliability of eyewitness identification where eyewitness identification of defendant was the only substantial element of the prosecution's case, eyewitnesses expressed high confidence in their identification of defendant, and proffered expert testimony would have shown a poor relationship between the confidence of eyewitnesses, in general, and the reliability of such witnesses' testimony. *People v. Campbell*, 847 P.2d 228 (Colo. App. 1992).

Trial court properly excluded expert testimony. The study was not conducted in conformance with any standard or procedure that would ensure its reliability. As well, there was no evidence the participants were a representative sampling that would yield reliable statistical analysis. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

Although admission of DNA evidence was the subject of conflicting testimony, where there was expert testimony to support the court's ruling, it was within the trial court's discretion to allow admission of the evidence. *People v. Lindsey*, 868 P.2d 1085 (Colo. App. 1993).

Admission of DNA evidence derived from multiplex DNA testing systems that met the standard for admission of scientific evidence under C.R.E. 702 was proper under this rule. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

Trial court did not abuse its discretion in admitting photographs taken at the autopsy. *People v. Moya*, 899 P.2d 212 (Colo. App. 1994).

If a contract is deemed ambiguous, court may admit extrinsic or parol evidence to assist in ascertaining intent of parties. *Cheyenne Mountain Sch. D. v. Thompson*, 861 P.2d 711 (Colo. 1993).

Three-part test under equivalent federal rule applied in *People v. Campbell*, 847 P.2d 228 (Colo. App. 1992).

Statements that were not unduly inflammatory nor likely to prevent jury from making a rational decision will not be found unduly prejudicial. *People v. Quintana*, 882 P.2d 1366 (Colo. 1994).

Testimony that detective recognized the defendant on a surveillance videotape was not so unfairly prejudicial as to mandate its exclusion. *People v. Robinson*, 908 P.2d 1152 (Colo. App. 1995), *aff'd* on other grounds, 927 P.2d 381 (Colo. 1996).

Introduction of dog-tracking evidence proper where testimony of dog handler establishes sufficient foundation and there is corroborating evidence of defendant's guilt. *People v. Brooks*, 950 P.2d 649 (Colo. App. 1997), *aff'd*, 975 P.2d 1105 (Colo. 1999).

Elements of a proper foundation for dog tracking evidence listed in *Brooks v. People*, 975 P.2d 1105 (Colo. 1999).

Prosecutor's use of expert testimony regarding drug courier profiles as substantive evidence of defendant's guilt was improper, and, although a reasonable jury could have convicted on other evidence, the admissible evidence did not overwhelmingly establish defendant's guilt, and there is a significant probability that the erroneously admitted testimony substantially influenced the jury's verdict, and thus was not harmless. *Salcedo v. People*, 999 P.2d 833 (Colo. 2000).

Court did not err in admitting drug courier profile testimony from police officer because it was testimony regarding how illegal drugs were transported, not specific personal characteristics of drug couriers themselves. The testimony aided the jury's understanding of an activity with which they were not likely to be familiar. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

In eminent domain proceeding, commission did not abuse its discretion in admitting evidence regarding city's opposition to landowner's planned unit development (PUD) application for limited purposes. Commission did not abuse its discretion in admitting evidence of city's involvement as background on the issuance of the application, the steps necessary to obtain it, and the timeliness of the process. Moreover, the commission minimized any prejudicial effects of such evidence by excluding testimony regarding city's motives in opposing PUD application. *City of Englewood v. Denver Waste Transfer, L.L.C.*, 55 P.3d 191 (Colo. App. 2002).

Because expert testifying in shaken-impact syndrome case never purported to know what minimum force would be required to cause a subdural hematoma and because testimony was properly qualified by other statements of the same expert, a single improper inference by prosecution referring to "the force it takes to make a baby's brain bleed" in opening statement of prosecution was not sufficient to render the trial fundamentally unfair and, therefore, did not rise to the level of plain error. *People v. Dunaway*, 88 P.3d 619 (Colo. 2004).

Trial court did not abuse discretion by allowing expert testimony to show the basis of the physician's opinion when it was undisputed that massive, violent force causes subdural hematoma and when physician's testimony related to situations that involve massive, violent force to help the jury understand the facts of the shaken-impact syndrome case before it. *People v. Martinez*, 74 P.3d 316 (Colo. 2003).

Trial court did not abuse discretion by declining to conduct an in camera review of records of the investigation of detective's alleged moonlighting during on-duty hours to determine whether defendant could use such records to impeach the detective's credibility or allow the defense to admit other evidence of the moonlighting investigation. *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

When a witness describes an item of real evidence, testimony as to its description and out-of-court identification may be admitted. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

Court may properly allow testimony concerning defendant's pre-advisement silence without causing prejudice if defendant testified and the evidence of defendant's pre-advisement silence was elicited in the cross-examination of defendant for credibility purposes. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

Identification of inanimate object is not a crucial element of proof, therefore, the same constitutional protections for identifying suspects do not apply to procedures used in identifying inanimate objects. As a result, any inadequacy in the procedure followed and the failure to use other procedures reasonably available are arguments that can be made to the jury. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial, argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. *Liggett v. People*, 135 P.3d 725 (Colo. 2006).

Evidence of an alias is admissible when it is relevant to an issue of identification or an attempt to avoid detection. In this case, the alias evidence was relevant to the issue of identification, ownership of the car, and, inferentially, the possession of the marihuana. Since its legitimate probative value outweighed the danger of unfair prejudice, the alias evidence was properly admitted. *People v. Valencia*, 169 P.3d 212 (Colo. App. 2007).

Defense counsel may open the door to the admission of evidence through questions concerning the method of interrogation by detectives and the motives of witnesses to change their testimony by raising those issues in an opening statement. *People v. Davis*, ___ P.3d ___ (Colo. App. 2010).

Evidence of past cocaine use not admissible in medical malpractice case. Trial court abused its discretion in admitting highly prejudicial and confusing evidence of plaintiff's past cocaine use. There was no evidence of cocaine use around the time of the alleged malpractice and danger of unfair prejudice substantially outweighed any probative value. *Haralampopoulos v. Kelly*, ___ P.3d ___ (Colo. App. 2011).

Applied in *People v. Cole*, 654 P.2d 830 (Colo. 1982); *People v. Perez*, 656 P.2d 44 (Colo. App. 1982); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983); *People v. Hogan*, 703 P.2d 634 (Colo. App. 1985); *People v. Randall*,

711 P.2d 689 (Colo. 1985); *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882 (Colo. 1986); *People v. Wafai*, 713 P.2d 1354 (Colo. App. 1985), *aff'd*, 750 P.2d 37 (Colo. 1988); *Lamont v. Union Pacific R.R.Co.*, 714 P.2d 1341 (Colo. App. 1986); *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986); *People v. Auldrige*, 724 P.2d 87 (Colo. App. 1986); *People v. Alexander*, 724 P.2d 1304 (Colo. 1986); *People v. Abeyta*, 728 P.2d 327 (Colo. App. 1986); *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Turner*, 730 P.2d 333 (Colo. App. 1986); *People v. Montgomery*, 743 P.2d 439 (Colo. App. 1987); *People v. Huckleberry*, 768 P.2d 1235 (Colo. App. 1989); *People v. Franklin*, 782 P.2d 1202 (Colo. App. 1989); *People v. Martin*, 791 P.2d 1159 (Colo. App. 1989); *Koehn v. R.D. Werner Co., Inc.*, 809 P.2d 1045 (Colo. App. 1990); *Martin v. Principal Cas. Ins. Co.*, 835 P.2d 505 (Colo. App. 1991), *rev'd sub nom Budget Rent-A-Car Corp. v. Martin*, 855 P.2d 1377 (Colo. 1993); *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), *cert. denied*, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999); *George v. Welch*, 997 P.2d 1248 (Colo. App. 1999), *rev'd on other grounds*, 19 P.3d 675 (Colo. 2000); *People v. Ellsworth*, 15 P.3d 1111 (Colo. App. 2000); *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004); *People v. Gonzales-Quevedo*, 203 P.3d 609 (Colo. App. 2008).

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Federal Rule Identical.)

Source: (a) amended and adopted June 20, 2002, effective July 1, 2002; (a)(1), (a)(2), and (b) amended and effective September 27, 2007.

COMMITTEE COMMENT

See also § 16-10-301, C.R.S. (Volume 8, 1978 Repl. Vol.), adopted by 1975 Legislature, setting for statute on standards and methods of

proof relating to evidence of similar transactions in cases involving charges of unlawful sexual behavior.

ANNOTATION

- I. General Consideration.
- II. Character Evidence.
- III. Other Crimes, Wrongs, or Acts.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence", see 58 U. Colo. L. Rev. 1 (1986-87). For article, "How Should We Treat Character Evidence Offered to Prove Conduct?", see 58 U. Colo. L. Rev. 279 (1987). For casenote, "People v. Spoto: Teasing the Defense on Prior Bad Acts Evidence", see 63 U. Colo. L. Rev. 783 (1992). For article, "The Use of Rule 404(a) Character Evidence In Civil Cases", see 23 Colo. Law. 1801 (1994). For article, "Other Bad Act Evidence: How to Avoid the Slings and Arrows", see 26 Colo. Law. 43 (April 1997). For comment, "Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties", see 79 U. Colo. L. Rev. 587 (2008). For article, "The Expanding Use of the Res Gestae Doctrine", see 38 Colo. Law. 35 (June 2009).

Rule applies in administrative proceedings as well as in criminal and civil cases. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Rule gives an accused the right to introduce character evidence without prior character attack; accordingly, administrative hearing officer erred in not permitting defendant to present character evidence on grounds of irrelevancy. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Documents excluded as irrelevant. People v. Walker, 666 P.2d 113 (Colo. 1983).

Applied in People v. Alward, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984); People v. Jones, 675 P.2d 9 (Colo. 1984); People v. Lucero, 677 P.2d 370 (Colo. App. 1983), cert. dismissed, 706 P.2d 1283 (Colo. 1985); People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

II. CHARACTER EVIDENCE.

Prior acts of violence are not generally admissible to establish self-defense, unless the defendant had knowledge of the prior acts of violence at the time of the incident. People v. Jones, 635 P.2d 904 (Colo. App. 1981); People v. Lucero, 714 P.2d 498 (Colo. App. 1985).

In the absence of a claim of self-defense, district court's exclusion of evidence of alleged violent and abusive acts by the murder victim was proper. People v. Smith, 848 P.2d 365 (Colo. 1993).

Evidence may show character trait of aggression of victim. When the purpose of the evidence is to show a pertinent character trait of the victim from which it may be inferred that he was the initial aggressor, that trait may be shown by specific instances of past conduct. People v. Jones, 635 P.2d 904 (Colo. App. 1981).

Weight to be accorded evidence of good character in criminal proceeding. People v. White, 632 P.2d 609 (Colo. App. 1981).

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith. People v. Hansen, 708 P.2d 468 (Colo. App. 1985).

Specific instances of conduct introduced to counter evidence of good reputation or character must be relevant instances of conduct, that is, conduct related to the character trait put in issue. People v. Pratt, 759 P.2d 676 (Colo. 1988); People v. Kreiter, 782 P.2d 803 (Colo. 1989).

When prosecution seeks to admit any evidence that suggests defendant is a person of bad character, it must explain why the logical relevance of that evidence does not depend on the inference that defendant acted in conformity with his or her bad character. Court properly admitted defendant's journal entries since they were relevant to establish defendant's mental state and rebut defendant's claims that he or she acted accidentally or in self-defense. Although the evidence had the potential of unfair prejudice, there was no abuse of discretion by the court. People v. Griffin, 224 P.3d 292 (Colo. App. 2009).

No plain error for failing to provide a limiting instruction when instruction was not

required to be given either by statute or by timely request. *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009).

Erroneous rulings regarding introduction of character evidence sufficient to reverse conviction where defendant refrained from presenting defense based on such rulings. *People v. Kreiter*, 782 P.2d 803 (Colo. 1989).

When impeachment is based upon rumor, the impeaching party has the burden of showing that acts forming the basis of rumor actually occurred. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Evidence in the form of reputation or opinion concerning a witness' character for truthfulness may be introduced to support the credibility of the person when the witness' character for truthfulness has been attacked; however, such testimony must be based on opinion held generally in a broad community. *People v. Ayala*, 919 P.2d 830 (Colo. App. 1995).

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial, argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. *Liggett v. People*, 135 P.3d 725 (Colo. 2006).

Reputation is distinguished from rumor in that it must be established over a period of time. *People v. Ayala*, 919 P.2d 830 (Colo. App. 1995).

Reputation and rumor distinguished. *People v. Erickson*, 883 P.2d 511 (Colo. App. 1994).

Court's failure to require a showing of the basis and relevance of specific instances of misconduct was error where the risk of prejudice of jury was great. Where prosecutor cross-examined character witness concerning alleged tying of nursing home patients to chairs, there was risk of prejudice sufficient to require advance determination by the court that such incidents likely had occurred and were in fact improper. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Admission of evidence that victim was an excellent worker and top employee, when defendant did not present any evidence going to the victim's trait of character, was reversible error. *People v. Jones*, 743 P.2d 44 (Colo. App. 1987).

Testimony that a person is a "cautious driver" is character evidence under this rule and not habit evidence under C.R.E. 406. *People v. T.R.*, 860 P.2d 559 (Colo. App. 1993).

Trial court erred in ruling that evidence was inadmissible pursuant to C.R.E. 608 when it was admissible pursuant to subsection (a)(1) of this rule. *People v. Miller*, 862 P.2d 1010 (Colo. App. 1993).

Testimony regarding victim's character may be relevant where self-defense is raised as a defense. *People v. Erickson*, 883 P.2d 511 (Colo. App. 1994).

But where theory of defense was that homicide was committed in self-defense against a homosexual assault and the victim's alleged homosexuality itself would not prove an element of self-defense, evidence of the victim's homosexuality could only be introduced via reputation or opinion evidence, not via a specific instance of conduct. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).

Opinion or reputation testimony was clearly relevant to establish a person's reputation in the community for peacefulness, and the trial court correctly permitted a witness to testify about such reputation. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. Defense counsel raised self-defense as an affirmative defense during opening statements, and elicited testimony to support the affirmative defense during cross examination of a prosecution witness. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Trial court appropriately admitted prosecution testimony of episode of anger on part of defendant to rebut character trait of peacefulness set forth by defendant. *People v. Garcia*, 964 P.2d 619 (Colo. App. 1998), rev'd on other grounds, 997 P.2d 1 (Colo. 2000).

Statement of defendant that her multiple personality disorder had been cured by the time of the murder was properly admitted even if defendant had not raised issue of diminished mental capacity. Statement was relevant to prosecution's theory that defendant had given a number of false and inconsistent statements to law enforcement officials after the murder and her purpose in mentioning the personality disorder was to explain why her statements had been inconsistent. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Trial court did not abuse its discretion in excluding character witness testimony because defendant admitted to using a false social security number he knew was not his own, and any evidence pertaining to his character for truthfulness was irrelevant in that respect. *People v. Montes-Rodriguez*, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Similarly, trial court did not abuse its discretion in excluding evidence regarding whether or not defendant knew whose social security number he used. Because defendant admitted to using a social security number that was not his own, the evidence was irrelevant. *People v. Montes-Rodriguez*, 219 P.3d 340

(Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

A criminal defendant who testifies in his own defense at trial does not automatically have the right to present evidence of his character for truthfulness under this rule. The rule is intended to permit admissibility of pertinent traits and truthfulness is a pertinent trait only if it is involved in the offense charged. *People v. Miller*, 890 P.2d 84 (Colo. 1995).

Administrative hearing officer's error in not allowing certain opinion testimony at teacher's disciplinary hearing did not affect any substantial right of petitioner where record reflects that, despite ruling, petitioner was permitted to present a substantial amount of character evidence and hearing officer concluded that petitioner was a person of good character. *Knowles v. Bd. of Educ.*, 857 P.2d 553 (Colo. App. 1993).

Although the defendant "opened the door" to questioning about why he or she was in Kansas, the prosecution could have elicited testimony that defendant gave a reason other than "family" as he or she testified to in court. The defendant's statement that he or she came to Kansas about drugs was not relevant to the case and injected defendant's bad character into the case and should have been inadmissible. *People v. Rincon*, 140 P.3d 976 (Colo. App. 2005).

III. OTHER CRIMES, WRONGS, OR ACTS.

Law reviews. For article, "Rule 404(b): Evidence of Other Crimes, Wrongs or Acts", see 23 *Colo. Law.* 355 (1994). For article, "Admissibility of 'Other Acts' Evidence Under C.R.E. 404(b)", see 32 *Colo. Law.* 87 (July 2003).

Rule accords trial courts great discretion in admitting evidence of other acts, and that discretion is abused only if a ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

Evidence of prior criminality casts damning innuendo likely to beget prejudice in the minds of juries. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

Therefore, prior criminal record generally inadmissible. As a general rule, subject to some exceptions, a prior criminal record of a defendant is inadmissible, and the introduction of such a record is reversible error. *Serratore v. People*, 178 Colo. 341, 497 P.2d 1018 (1972).

Evidence of other crimes tending to prove res gestae of offense charged admissible. Where evidence of other crimes tends to prove the res gestae, these "other crimes" are not wholly independent of the offense charged, and it is not error to admit such evidence without giving a jury instruction in reference to the limited purpose for which the evidence of other

crimes can be used. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972); *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990); *People v. Fears*, 962 P.2d 272 (Colo. App. 1997); *People v. Lucas*, 992 P.2d 619 (Colo. App. 1999); *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001); *People v. Merklin*, 80 P.3d 921 (Colo. App. 2003).

Although prior robbery and the murder with which defendant was charged were somewhat remote in time, they were inextricably intertwined because the victim of the murder had been a witness to the robbery, and evidence of the robbery gave context to the murder. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Evidence of illegal drug paraphernalia was relevant to the question of defendant's knowledge of the nature of the drugs recovered from his apartment and their illegality without a prescription. Such evidence also gave the jury a more complete picture of the circumstances under which the drugs were found. *People v. Valdez*, 56 P.3d 1148 (Colo. App. 2002).

Evidence of federal drug violation could properly be considered "part and parcel of the criminal episode" that became the basis for defendant's state prosecution. The prior drug transaction was closely interwoven with the facts of defendant's arrest and served to provide a context in which the jury could both understand the circumstances of the arrest and the validity of the charges. *People v. Skufca*, 141 P.3d 876 (Colo. App. 2005), rev'd on other grounds, 176 P.3d 83 (Colo. 2008).

Evidence of other crimes is admissible to prove res gestae when such evidence is inextricably intertwined with the crime charged. *People v. Workman*, 885 P.2d 298 (Colo. App. 1994); *People v. Thomeczek*, __ P.3d __ (Colo. App. 2011).

Such as where other activity part and parcel of entire criminal transaction. Where evidence that the defendant smoked marijuana cigarettes was elicited to show knowledge on the part of the defendant with regard to the possession of marijuana and was not adduced to show "another crime", nor to show that the defendant was evil and capable of committing crimes, and the activity was part and parcel of the entire criminal transaction entered into by the defendant, a limiting instruction was not necessary and the testimony was properly admitted. *Dickerson v. People*, 179 Colo. 146, 499 P.2d 1196 (1972).

Evidence of argument between defendant and his girlfriend on night before fatal shooting was part and parcel of entire event and, therefore, properly admitted as res gestae of offense charged. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998).

Evidence presented at trial established that conduct was so closely connected to the main criminal transaction that evidence of it was nec-

essary to complete the story of the crime. Without that evidence, the murder might not be properly understood as the jury would have no basis upon which it could determine the reasons behind defendant's conduct. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

Res gestae evidence need not meet the procedural requirements of evidence introduced pursuant to section (b). Before admitting res gestae evidence, however, the trial court must find that its probative value is not substantially outweighed by the danger of unfair prejudice. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998); *People v. Thomeczek*, __ P.3d __ (Colo. App. 2011).

Evidence of wholly independent offense to prove accused guilty of offense charged inadmissible. Evidence is not admissible which shows, or tends to show, that an accused has committed a crime wholly independent of the offense for which he is on trial, for no person shall be convicted of an offense by proving that he is guilty of another. *Kostal v. People*, 144 Colo. 505, 357 P.2d 70 (1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961); *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971); *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972); *People v. Ihme*, 187 Colo. 48, 528 P.2d 380 (1974); *People v. Geller*, 189 Colo. 338, 540 P.2d 334 (1975).

In a criminal trial to a jury, evidence of a defendant's criminal activity, which is unrelated to the offense charged, is inadmissible, and when reference is made in the presence of the jury to such criminal activity, a mistrial is normally required. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

The general rule is that evidence is not admissible which shows or tends to show that the accused has committed a crime wholly independent of the offense for which he is on trial. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

As a general rule, evidence of other criminal acts is inadmissible because of its prejudicial effect. *People v. Mason*, 643 P.2d 745 (Colo. 1982).

Evidence that is not contemporaneous with the crime charged and does not illustrate its character is not part of the res gestae, and evidence that the defendant urged his wife not to testify with respect to the murder that defendant had allegedly committed two years earlier that implicated him in the separate crime of witness tampering was therefore not admissible as res gestae. However, such evidence was admissible to show the defendant's consciousness of guilt. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), aff'd on other grounds, 71 P.3d 973 (Colo. 2003).

Because guilt of one crime cannot be presumed by commission of another crime. It is not proper to raise a presumption of guilt on the

ground that having committed one crime the depravity it exhibits makes it likely the defendant would commit another. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972); *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

To be admissible, similar transaction evidence must meet three tests: (1) Is there a valid purpose for which the evidence is offered? (2) Is the evidence relevant to a material issue in the case? (3) Does the probative value of the evidence of the prior act, considering the other evidence which is relevant to the issue, outweigh the prejudice to the defendant which would result from its admission? *People v. Casper*, 631 P.2d 1134 (Colo. App. 1981); *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981); *People v. Quintana*, 682 P.2d 1226 (Colo. App. 1984); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986).

Test for admissibility is applied in *Coll. v. Scanlan*, 695 P.2d 314 (Colo. App. 1985); *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985); *Jacobs v. Com. Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986); *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), aff'd, 770 P.2d 1243 (Colo. 1989); *People v. Duncan*, 754 P.2d 796 (Colo. App. 1988); *People v. Czemyrnski*, 786 P.2d 1100 (Colo. 1990).

To be admissible, the prior act evidence must relate to a material fact, be logically relevant, and be independent of the intermediate inference of bad character and its probative value must outweigh the danger of unfair prejudice. *People v. Wallen*, 996 P.2d 182 (Colo. App. 1999); *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002).

Prerequisites and factors to be considered by the trial court in determining whether to admit evidence of similar transactions under statute relating to sexual assault on a child are listed in *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

Trial court committed reversible error in admitting evidence of a prior criminal incident where the incident was too remote in time to constitute res gestae evidence, knowledge of the prior incident was not necessary to enable the jury to understand testimony concerning the incident at issue, and the probative value of the references to the prior incident was significantly outweighed by the danger of unfair prejudice. *People v. Frost*, 5 P.3d 317 (Colo. App. 1999).

Trial court erred in admitting evidence of a prior act because it failed to meet the second and third prong of the *People v. Spoto* analysis. The prior act evidence did not show a tendency that can be separated from the prohibited inference that defendant acted a certain way in the past and therefore acted that way in this case and offered little probative value that was substantially outweighed by the danger of

unfair prejudice. *Yusem v. People*, 210 P.3d 458 (Colo. 2009).

Evidence of other crimes is admissible to show guilt of crime charged. If evidence which is competent, material, and relevant to the issue of defendant's guilt of the crime for which he is on trial is not admitted for the purpose of showing the defendant's guilt of other crimes, but rather because it is relevant to show the defendant's guilt of the crime for which he is being tried, then it is not error to admit such evidence. *Tanksley v. People*, 171 Colo. 77, 464 P.2d 862 (1970).

Evidence of defendant's gang affiliation admissible as *res gestae*. In murder trial, it would not be possible to tell the story of the events without referring to the relationship among the actors who were all gang members. *People v. Martinez*, 24 P.3d 629 (Colo. App. 2000).

Evidence that defendant's body showed signs of drug use, that defendant possessed police scanners commonly associated with drug distribution, and that defendant possessed a notebook that was the same type used by drug dealers to document sales admissible as *res gestae*. *People v. Griffiths*, 251 P.3d 462 (Colo. App. 2010).

Evidence of other crimes, wrongs, or acts is inadmissible if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue. *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

Drawings and writings that were nothing more than evidence of defendant's violent nature simply authorized the inference that defendant had a bad character and killed the victim because of his bad character and thus were erroneously admitted as opposed to defendant's admissible drawings that paired sex with violence, represented rehearsal fantasy, evinced a hatred of women, or reflected specific aspects of the crime and thus revealed defendant's motive, preparation, plan, opportunity, or guilty knowledge; however, based on the totality of the circumstances, the jury was not substantially influenced by the inadmissible drawings and writings. *Masters v. People*, 59 P.3d 979 (Colo. 2002).

Existence of bench warrant was not relevant and admissible as "history of arrest evidence", because the purpose of history of arrest evidence is to show the existence or absence of consciousness of guilt, and, without evidence that defendant knew that the prior warrant existed, mere evidence that a prior warrant existed would not have been relevant to that issue. *People v. Perry*, 68 P.3d 472 (Colo. App. 2002).

Evidence of similar offenses admissible to show intent, motive, plan, scheme, or design. Evidence of similar offenses is admissible for certain purposes only, such as for the purpose of showing plan, scheme, design, intent, guilty knowledge, motive, or identity. *Kostal v. People*, 144 Colo. 505, 357 P.2d 70 (1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961); *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971); *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972); *People v. Dago*, 179 Colo. 1, 497 P.2d 1261 (1972); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972); *People v. Ihme*, 187 Colo. 48, 528 P.2d 380 (1974); *People v. Czernyynski*, 786 P.2d 1100 (Colo. 1990); *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993); *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd* on other grounds, 2 P.3d 1283 (Colo. 2000); *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

The exceptions to the rule that the evidence of a defendant's criminal activity, unrelated to the offense charged, is inadmissible are limited to well defined and special situations where proof of other similar offenses will show the defendant's intent, motive, plan, scheme, or design with respect to the crime charged. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

The exception to the rule, that evidence tending to prove the defendant guilty of a crime other than of the offense charged is not admissible, is applicable when the evidence is of a similar transaction and goes to the proof of intent, motive, plan, scheme, or design, and especially is this true where the other transactions are so connected in point of time with the offense under trial and so similar in character that a plan or scheme can be imputed as to all of them. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Court was justified in admitting evidence of a single prior incident since it was logically relevant under the doctrine of chances. Based on the relative similarity of the Pennsylvania sexual assault and the relative infrequency of two women separated by great geographical distance describing similar incidents was sufficient to admit the evidence. *People v. Everett*, 250 P.3d 649 (Colo. App. 2010).

Admission of prior act evidence when defendant had been acquitted of the prior act does not violate due process or double jeopardy. *Kinney v. People*, 187 P.3d 548 (Colo. 2008).

Informing jury of defendant's acquittal of a prior act is up to the discretion of the trial court on a case-by-case basis as long as the information's probative value substantially outweighs its prejudicial effect. *Kinney v. People*, 187 P.3d 548 (Colo. 2008).

An acquittal instruction is appropriate when the testimony or evidence presented at trial

about the prior act indicates that the jury has likely learned or concluded that the defendant was tried for the prior act and may be speculating as to the defendant's guilt or innocence in that prior trial. *Kinney v. People*, 187 P.3d 548 (Colo. 2008).

Appellate court will review trial court's decision for an abuse of discretion. *Kinney v. People*, 187 P.3d 548 (Colo. 2008).

Trial court did not err by admitting evidence of other transactions when such evidence was determined to be relevant to prove intent, identity, motive, preparation or plan, and modus operandi and jury was instructed that evidence was to be used solely for those purposes. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Trial court did not abuse discretion in admitting evidence of prior incident of sexual assault on a child where incident had occurred eight years earlier, the evidence was introduced only to prove identity, and the jury was instructed that identity was the only purpose for which the evidence could be considered. *People v. Apodaca*, 58 P.3d 1126 (Colo. App. 2002).

Generally, evidence of prior acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

However, such evidence may be admissible for proof of, among other things, motive and intent. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Evidence is subject to exclusion under paragraph (b) only if it is offered to prove the defendant acted in conformity with a character trait. Prosecution clearly did not offer the evidence for that purpose. *People v. Harland*, 251 P.3d 515 (Colo. App. 2010).

Evidence with reference to another transaction than that charged is admissible only as bearing upon the question of whether or not the defendant had a plan or design to produce a result of which the act charged was a part, and the jury can consider such evidence for no other purpose, for the defendant cannot be tried for or convicted of any offense not charged. *Mays v. People*, 177 Colo. 92, 493 P.2d 4 (1972).

Criteria used to determine admissibility of evidence of prior conduct to prove intent are (1) whether the defendant's intent is a material issue in dispute; (2) whether the prior conduct involved the same intent as in the charged offense; and (3) whether the probative value of the evidence outweighs its prejudicial effect. *People v. Spoto*, 772 P.2d 631 (Colo. App. 1988); *Munson v. Boettcher & Co.*, 832 P.2d 967 (Colo. App. 1991); *People v. Close*, 867 P.2d 82 (Colo. App. 1993); *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

Court properly admitted evidence of similar transactions in murder prosecution in-

volving defendant's previous conduct of firing a handgun where such evidence was offered for the limited purpose of proving intent. *People v. Willner*, 879 P.2d 19 (Colo. 1994).

Proof of motive which is relevant and material not excluded. While evidence of offenses other than the one for which the defendant is on trial is not admissible, proof of motive will not be excluded merely because it may be prejudicial to the defendant, as long as it is relevant and material. *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972).

Defendant's drawings and narratives of acts of violence that were similar to the manner in which the victim was killed were sufficiently similar so as to be logically relevant to defendant's motive, intent, and plan to commit the crime, and it was not error to introduce such evidence because intent was a material element required to be proven by the prosecution. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd*, 59 P.3d 979 (Colo. 2002).

Evidence of prior threats and acts of violence toward women admissible to establish motive for alleged attack on a woman. Evidence showed defendant's anger toward and hatred of women and could provide a basis for a jury finding that defendant used violence and threats of violence against women when they frustrated his desires in order to force them to comply with his wishes. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

Evidence admissible to show ill will. Ill will between the victim and the defendant is one purpose for which evidence of other crimes may be admissible. *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991).

A prior attack by the defendant on the victim is admissible as evidence of intent, in that it is probative of malice and ill will toward the victim. *People v. Curtis*, 657 P.2d 990 (Colo. App. 1982).

Testimony related to activity allegedly occurring shortly before the time of the alleged crime, which was probative of ill will between the victim and defendant and relevant to the status of their relationship, is admissible. *People v. St. John*, 668 P.2d 988 (Colo. App. 1983).

Evidence of argument with passenger in defendant's own vehicle just prior to altercation with the victim, a driver of another vehicle, admissible. The evidence was used to show that defendant's angry state of mind persisted up to and included the time of the shooting and was permissible for jury to hear. *People v. Rudnick*, 878 P.2d 16 (Colo. App. 1993).

Evidence that the night before the defendant shot the victim, he struck her and pulled her hair, was relevant to disproving defendant's claim that the shooting was an accident by showing the defendant's indifference

to the victim's welfare and trial court's limiting instruction was sufficient to restrict the jury's consideration of evidence to that purpose. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

To resolve an issue of admissibility of prior acts, a court must determine whether the proffered evidence relates to a fact that is of consequence to determination of the action, whether evidence makes existence of a consequential fact more probable or less probable than it would be without such evidence, whether the logical relevance is independent of the prohibited intermediate inference that the defendant has bad character and probably acted in conformity with such bad character, and whether probative value of evidence is substantially outweighed by danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); *People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Ellsworth*, 15 P.3d 1111 (Colo. App. 2000); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

Test applied in *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994); *People v. Harris*, 892 P.2d 378 (Colo. App. 1994); *Winkler v. Rocky Mountain Conference*, 923 P.2d 152 (Colo. App. 1995); *People v. Marquantte*, 923 P.2d 180 (Colo. App. 1995); *People v. Shepard*, 989 P.2d 183 (Colo. App. 1999); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); *People v. Rath*, 44 P.3d 1033 (Colo. 2002); *People v. Harrison*, 53 P.3d 1103 (Colo. App. 2002); *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005); *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007); *Yusem v. People*, 210 P.3d 458 (Colo. 2009); *People v. Glasser*, — P.3d — (Colo. App. 2011).

This test must be applied to issues of admissibility of prior acts, notwithstanding the language of § 16-10-301. The statute is permissive and contains no language that erodes the test. Thus, even when evidence of prior similar transactions is introduced in prosecutions specifically mentioned in the statute, an analysis under section (b) of this rule is still necessary. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Spoto does not demand absence of an inference that a defendant has bad character and acts in conformity with such behavior; it only requires proof that evidence of bad character is logically relevant independent of such inference. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

Evidence of defendant's possession and ownership of several knives was probative independent of an intermediate inference regarding the defendant's character. In trial where defendant allegedly stabbed victim, defendant's possession and ownership of the knives made it more probable that defendant had a knife when victim was stabbed and that defendant inflicted the wounds. Therefore, an inference about the defendant's character was not the only possible relevance of the knives, and the trial court did not abuse its discretion by admitting them as evidence. *People v. Cordova*, — P.3d — (Colo. App. 2011).

Reversible error to admit defendant's statement about prior accusations of misconduct absent compliance with the requirements of Spoto and Garner. Defendant's statement alone is not sufficient to justify admission of the evidence. *People v. Novitskiy*, 81 P.3d 1070 (Colo. App. 2003).

A defendant is on notice of the permissible purposes for which evidence of the defendant's prior bad acts is being offered under subsection (b) of this rule when the prosecutor states, at the hearing on the prosecution's motion to introduce similar transaction evidence, that the evidence was being offered to establish identity, guilty knowledge, intent, design, and motive. The defendant may not later claim that the prosecutor failed to articulate a "precise evidential hypothesis by which a material fact can be permissibly inferred from the prior misconduct independent of the inference prohibited by [this rule]". *People v. Harding*, 983 P.2d 29 (Colo. App. 1998), 17 P.3d 183 (Colo. App. 2000).

Testimony about prior incidents of other, similar alleged misconduct by church counselor with other counselees was not manifestly erroneous and thus was not improperly admitted in a civil action. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214 (Colo. App. 1994).

The rule is not limited in application only to evidence of other crimes but permits evidence of other wrongs or acts, provided the evidence is offered for the proof of a material issue and substantive and procedural prerequisites are met. *People v. Campbell*, 706 P.2d 431 (Colo. App. 1985); *People v. Jackson*, 748 P.2d 1326 (Colo. App. 1987); *Douglas v. People*, 969 P.2d 1201 (Colo. 1998).

The rule is not limited in application only to prior uncharged acts of the accused; the use of the word "person" in section (b) of this rule includes individuals other than the accused. *People v. Harris*, 892 P.2d 378 (Colo. App. 1994).

Evidence does not become inadmissible under this rule or under the "rape shield" statute, § 18-3-407, simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual

conduct. Where evidence of a person's prior acts is probative for reasons other than its tendency to show the person's propensity to perform similar acts at another time, the evidence is generally admissible. *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

Evidence of prior similar transactions is admissible in cases of sexual assault on a child if such evidence is offered to show a common plan, scheme, design, identity, modus operandi, motive, guilty knowledge, or intent. *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1989); *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993); *People v. Snyder*, 874 P.2d 1076 (Colo. 1994); *People v. Williams*, 899 P.2d 306 (Colo. App. 1995); *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

A prior act does not need to be similar in every respect to be admissible. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd* on other grounds, 59 P.3d 979 (Colo. 2002).

To refute the defense of recent fabrication, evidence of prior similar transactions is admissible in cases of sexual assault on a child. *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

Evidence of similar transactions in an incest case are admissible where there is sufficient and substantial similarity between the transactions and offense charged even though there were differences in the type of sexual activity. The evidence is also admissible on the issue of motive, and the trial court was not required to define motive for the jury. *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

When such prior similar transaction evidence is admitted, the court must require the prosecution to elect a specific act on which the jury is asked to convict or, in the alternative, provide the jury with a unanimity instruction. *Woertman v. People*, 804 P.2d 188 (Colo. 1991).

Evidence of prior criminal transactions is inadmissible where defendant was acquitted of similar act. The doctrine of collateral estoppel prevents the introduction of evidence of similar transactions for which a defendant has been acquitted. *People v. Arrington*, 682 P.2d 490 (Colo. App. 1983).

Evidence of other offenses is admissible where offenses are part of single transaction and an integral part of the total picture surrounding the offense with which the defendant is charged. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974); *People v. Wells*, 691 P.2d 361 (Colo. App. 1984); *Litwinsky v. Zavaras*, 132 F. Supp.2d 1316 (D. Colo. 2001).

Or to establish chain of circumstances. Where evidence is not introduced to show a transaction as independent criminal activity, but is used as one circumstance in a chain of circumstances to establish the defendants' com-

licity, it is admissible. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Evidence of prior acts may be admissible to rebut self-defense and defense of property defenses. *Douglas v. People*, 969 P.2d 1201 (Colo. 1998).

Evidence of separate motor vehicle theft was relevant when thefts were similar, and when following a crash of the separate motor vehicle, defendant possessed identification stolen at the time of first theft and falsely identified himself to police as the person whose identification he had stolen. *People v. Shepard*, 989 P.2d 183 (Colo. App. 1999).

Defendant's prior act was admissible to prove absence of accident. Where the prior act at issue was a violent one committed against the same child one week before the incident of physical abuse for which the defendant was on trial and where the basis for the evidence was to disprove defendant's defense of accident, the trial court did not err in admitting prior acts of the defendant as similar transaction evidence. *People v. Fulton*, 754 P.2d 398 (Colo. App. 1987).

In an action based on allegations of trespass and deceptive trade practices, trial court did not abuse its discretion in admitting the following evidence of prior similar acts to demonstrate absence of mistake or accident: (1) Testimony regarding a dispute over access to a subdivision owned by defendants; (2) a letter to defendants concerning another access dispute; and (3) testimony regarding prior real estate litigation in which defendants were accused of selling property without proper title. *Walter v. Hall*, 940 P.2d 991 (Colo. App. 1996), *aff'd* on other grounds, 969 P.2d 224 (Colo. 1998).

Exception recognized to show continuing scheme. A limited and well-defined exception is recognized where a similar act tends to establish the defendant's criminal culpability for the crime charged by showing that it was part of a continuing scheme and, hence, not the result of a mistake. *People v. Mason*, 643 P.2d 745 (Colo. 1982).

Failure to instruct jury on limited purpose for which evidence of similar transactions was admitted was not plain error. *People v. Tidwell*, 706 P.2d 438 (Colo. App. 1985); *People v. Lucero*, 724 P.2d 1374 (Colo. App. 1986).

While it is the better practice to issue a limiting instruction to the jury contemporaneously with the introduction of similar transactions evidence, when such an instruction is not requested, the failure to give one is not reversible error so long as the trial court properly applied the balancing test required to resolve the issue of admissibility. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Judge should repeat limited-purpose instruction in written instructions in order to

safeguard against potential misuse of other-crime evidence by the jury. *People v. Garner*, 806 P.2d 366 (Colo. 1991).

Evidence of other crimes, wrongs, or acts applies in civil cases if evidence relevant. While section (b) is more frequently applied in criminal prosecutions, it also applies in civil cases if the evidence is relevant to the issues. *Coll. v. Scanlan*, 695 P.2d 314 (Colo. App. 1985).

Evidence of a failure by a company to comply with a safety code or regulation at one point in time to support an allegation that the company failed to comply with safety regulations at another time does not satisfy any of the exceptions enumerated for admission of evidence of other crimes, wrongs, or acts. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

Evidence implicating defendant in another criminal case is admissible for purposes of identification. *Hollis v. People*, 630 P.2d 68 (Colo. 1981); *People v. White*, 680 P.2d 1318 (Colo. App. 1984).

Modus operandi. Where a witness testifies as to a second crime by the defendant, a crime for which the defendant is not being tried, the testimony is not prejudicial where it aids in the identification of the defendant, shows the same modus operandi, and where the judge gives a proper limiting instruction as to its use. *People v. Dago*, 179 Colo. 1, 497 P.2d 1261 (1972).

There is no error in the admission of evidence of another incident which, in addition to being closely proximate in time, involves features markedly similar to the offense charged. This evidence establishes a modus operandi that is highly probative of the issue of identity. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

To establish modus operandi as exception for the admission of another transaction, there must be a dissimilarity from the methods generally used in such offenses, and there must be a distinctive factor in the methods used. *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981).

Evidence of other crimes committed by the defendant is admissible where it is of similar crimes committed within the same geographical area within a few days, where similar methods were used, where the defendant himself introduced testimony pertaining to the transactions, and where the court followed proper procedures for the admission of such evidence. *Stanmore v. People*, 146 Colo. 445, 362 P.2d 1042 (1961), cert. denied, 368 U.S. 993, 82 S. Ct. 611, 7 L. Ed. 2d 529 (1962).

It is error to admit evidence of numerous crimes which are wholly dissimilar in character and committed hundreds of miles away from the scene of the crime charged and where it is admitted over the defendant's objections. *Kostal v. People*, 144 Colo. 505, 357 P.2d 70

(1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961).

Evidence inadmissible even if elicited from defendant. Prejudicial evidence concerning other unrelated crimes elicited from the defendant on cross-examination does not make it admissible. *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971).

Evidence of prior crime must be clear and convincing. The commission of the prior crime and the defendant's identity as the perpetrator of the crime must be shown by clear and convincing evidence. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Criteria used to determine admissibility of evidence of similar transactions in claims alleging fraud and violations of the Colorado Securities Act are: (1) Whether the proffered evidence relates to a material fact; (2) whether the evidence is logically relevant; (3) whether the logical relevance is independent of the intermediate inference that the defendants have bad character; and (4) whether the probative value is substantially outweighed by danger of unfair prejudice. *Munson v. Boettcher & Co., Inc.*, 832 P.2d 967 (Colo. App. 1991); *Abdelsamed v. New York Life Ins. Co.*, 857 P.2d 421 (Colo. App. 1992); *People v. Rivera*, 56 P.3d 1155 (Colo. App. 2002).

However, the trial court may properly admit similar transaction evidence under another evidentiary theory without complying with the procedural safeguards required by section (b). Thus, in a securities fraud case, evidence of a prior fraud conviction was admissible to show defendant's knowledge of prior misconduct that should have been disclosed to the victim. *People v. Campbell*, 58 P.3d 1148 (Colo. App. 2002).

Trial judge allowed substantial discretion when deciding admissibility of prior criminal activity. Because the trial judge must weigh the degree to which the charged criminal activity and an alleged prior criminal activity are similar, the bearing of the other transaction on the issues presented at the trial of the offense charged, and the degree to which the jury would be prejudiced by the other transaction, the trial judge is allowed substantial discretion when he decides regarding the admissibility of such evidence. *People v. Ihme*, 187 Colo. 48, 528 P.2d 380 (1974); *People v. Hogan*, 703 P.2d 634 (Colo. App. 1985).

Substantial discretion is accorded trial court to determine whether evidence of a similar transaction is relevant to a material issue and whether its relevance outweighs its prejudice. *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981); *Douglas v. People*, 969 P.2d 1201 (Colo. 1998); *People v. Rath*, 44 P.3d 1033 (Colo. 2002).

Trial court's admission of evidence of other acts will be disturbed only when it is demon-

strated that the trial court abused its discretion. *Douglas v. People*, 969 P.2d 1201 (Colo. 1998); *People v. Harrison*, 58 P.3d 1103 (Colo. App. 2002).

Trial court properly may base its preponderance of evidence determination solely on the parties' offers of proof. *People v. Moore*, 117 P.3d 1 (Colo. App. 2004).

Court need not conduct hearing where sufficient foundation established. A court's refusal to conduct an in camera hearing is proper where a sufficient foundation is established prior to the admission of evidence of other crimes. *Mays v. People*, 177 Colo. 92, 493 P.2d 4 (1972).

Although conditions should first be met. Where the trial court allows admission of evidence of other conduct of the defendant, there are four rather stringent conditions which should be met: (1) The prosecutor should advise the trial court of the purpose for which he offers the evidence; (2) if the court admits such evidence, it should then instruct the jury as to the limited purpose for which the evidence is being received and for which the jury may consider it; (3) the general charge should contain a renewal of the instruction on the limited purpose of such evidence; (4) the offer of the prosecutor and the instructions of the court should be in carefully couched terms — they should refer to "other transactions", "other acts", or "other conduct", and should eschew such designations as "similar offenses", "other offenses", "similar crimes", and so forth. *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1960); *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Including requiring prosecution to announce intention to offer evidence, and limiting instruction. Recognizing that evidence of past crimes has inhering in it damning innuendo likely to beget prejudice in the minds of the jurors, the best method requires that the prosecution announce its intention to offer evidence of other crimes for a limited purpose before it is introduced, and moreover, the trial court should issue a limiting instruction to the jury contemporaneously with the offering of such evidence, even though the defendant may not formally request such an instruction. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Section (b) of this rule does not require pretrial notice as a prerequisite for admitting other bad act evidence. Even so, there may be circumstances in which such notice, even though not required by section (b), might be necessary to avoid prejudicial surprise to a defendant. *People v. Warren*, 55 P.3d 809 (Colo. App. 2002).

Trial court must give cautionary instructions limiting the purpose of evidence of similar offenses. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

Where evidence of other criminal activity tends to show scheme, plan, intent, or design, the evidence will be admitted for that limited purpose, and in such cases, the trial judge is required to instruct the jury on the limited purpose for which the evidence of other criminal acts is admitted. *People v. Geller*, 189 Colo. 338, 540 P.2d 334 (1975).

Where evidence of other crimes is admitted under one of the exceptions listed in section (b) of this rule, the trial court is required to give cautionary instructions limiting the purpose of the evidence. *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

The court must instruct the jury as to the limited purpose for which evidence of prior similar transactions is admitted and for which the jury may consider it. *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1989).

Court's failure to give limiting instruction when admitting evidence of defendant's other bad acts was not error, where defense did not request the instruction during defendant's cross-examination. *People v. Marion*, 941 P.2d 287 (Colo. App. 1996).

Court's omission from the initial limiting instruction of the explicit purpose for which the bad act evidence was admitted was not error. Court rectified any potential prejudice to defendant by later informing the jury of the purpose. In addition, the court's written instruction reminded the jury that certain evidence had been admitted for a limited purpose. *People v. Warren*, 55 P.3d 809 (Colo. App. 2002).

Evidence of similar wrongs or acts are admissible to prove intent and motive. Evidence of insurance company's ongoing pattern of purposeful delays in paying benefits and economic motives in causing delay in the case at hand was properly admitted. *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990).

Testimony by the personnel director of her personal knowledge of defendant's outbursts of temper, including one directed toward the corporate victim's president which resulted in defendant's firing, were admissible as tending to establish a motive for defendant to retaliate against the corporation with bomb threats which were the basis of the charge against defendant. *People v. Reaud*, 821 P.2d 870 (Colo. App. 1991).

Testimony of undercover officer relating to alleged similar meetings between the officer and defendant accused of distribution and sale and possession of a controlled substance, without any indication of criminal activity, does not create an inference of other criminal acts and, therefore, was admissible to show the officer's ability to identify the defendant. *People v. Tyler*, 854 P.2d 1366 (Colo. App. 1993).

Reference to a “court appointed counselor” and a “court appointed therapist” by prosecution witnesses in sexual assault trial is not “other crime” evidence subject to the requirements of section (b). Trial court allowed the prosecution and other witnesses to refer to defendant’s probation officer as a “court-appointed counselor” and his offense-specific treatment provider as a “court appointed therapist”. Because evidence of defendant’s divorce was presented at trial, the court properly concluded that the jury could infer that defendant was in court-ordered counseling and therapy as part of the divorce proceedings and not as a condition of probation for a prior sexual assault conviction. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

Similar transaction evidence of whether the defendants engaged in a pattern or practice and a plan, scheme, or design in regard to the alleged fraud and violation of the Colorado Securities Act related to a material fact and the trial court erred in not allowing the plaintiffs to present such evidence where the probative value thereof was not substantially outweighed by the danger of unfair prejudice. *Munson v. Boettcher & Co., Inc.*, 832 P.2d 967 (Colo. App. 1991).

Application of the doctrine of chances is inappropriate where a previous incident was not similar enough to the current case to make the objective statistical inference, since similarity is crucial when the theory of logical relevance is the doctrine of chances, and where there was only one prior incident. *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

In order for the court to admit evidence of prior sexual assaults under the doctrine of chances theory, the court must determine that (1) the evidence of the other acts is similar to the charged crime; (2) the number of unusual occurrences exceeds the frequency of the general population; and (3) there is a genuine dispute over whether the act occurred. The facts that the victims were blond females and assaulted in the early morning hours after drinking are facts common to many sexual assaults. Therefore, the two previous assaults were not similar enough to be admitted to show common plan, scheme, or design, or to rebut the defense of consent. *People v. Jones*, ___ P.3d ___ (Colo. App. 2011).

Evidence of similar incidents of forging and impersonating victim relevant to establish context in which the fraudulent forgeries and impersonations occurred. *People v. Tyer*, 796 P.2d 15 (Colo. App. 1990).

Evidence of prior escape attempts and willingness to use force against law enforcement officers was admissible in trial for murder of deputy during escape attempt. *People v. Vialpando*, 954 P.2d 617 (Colo. App. 1997).

However, trial court’s failure to give limiting instruction held not plain error. Although the better practice is for trial court to issue a contemporaneous limiting instruction sua sponte, the failure to do so held not to be plain error. *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

No reversible error where cautionary instructions given. When evidence relating to other prior incidents of a similar nature between the defendant and the prosecuting witness is admitted and the court gives an oral cautionary instruction to the jury on the limited relevance of similar act testimony at the conclusion of the prosecuting witness’s testimony and a similar written instruction when the case is submitted to the jury, there is no reversible error. *People v. Elliston*, 181 Colo. 118, 508 P.2d 379 (1973).

Witness’s inadvertent reference to earlier trial on same charges, promptly followed by corrective instructions from the court, held not prejudicial. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Failure to give instruction on petty offense harmless error. Where evidence of a petty offense by a defendant is introduced during a trial for a felony, the trial judge should instruct the jury as to its limited purpose, but his failure to do so is harmless error, considering the nature of the petty offense as compared with the gravity of the felony charge against the defendant. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

No plain error for admission of prior criminal history. The testimony in this case referred to a criminal matter remote in time and to a criminal case without confirmation that the case resulted in a conviction, therefore, there was no plain error. *People v. McKinney*, 80 P.3d 823 (Colo. App. 2003), rev’d on other grounds, 99 P.3d 1038 (Colo. 2004).

Minor variations from standards for admission of evidence of other crimes not prejudicial. *Stanmore v. People*, 146 Colo. 445, 362 P.2d 1042 (1961), cert. denied, 368 U.S. 993, 82 S. Ct. 611, 7 L. Ed. 2d 529 (1962).

Evidence of plaintiff’s prior acts of negligence was admissible to support defendant’s theory that negligence of plaintiff and others was the sole cause of the accident. *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991).

Trial court did not err when it allowed the prosecution to introduce evidence of defendant’s prior felony convictions as character evidence where the record supports the trial court’s finding that the defendant opened the door for the prosecution to pose questions of the defendant’s character by eliciting testimony that the defendant’s aggression was directed only at a car until the victim provoked him, that aggressive behavior against the car was unusual, that defendant’s girl friend had never witnessed that type of aggressive behavior, and that defendant

was an "easy-going person" and had never harmed the witness. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Because defense initially adduced evidence concerning prior misconduct, trial court was not required to comply with the procedural requirements under section (b). *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), *rev'd* on other grounds, 48 P.3d 520 (Colo. 2002).

Evidence of defendant's prior domestic violence conviction was properly admitted. The conviction was relevant for impeachment purposes and was not prejudicial since it was a single, isolated, brief statement that was not a significant part of the prosecution's cross-examination or closing argument. *People v. Sommers*, 200 P.3d 1089 (Colo. App. 2008).

While section (b) is more frequently applied in criminal prosecutions, it also applies in civil cases if the proffered evidence is relevant to the issues. *Munson v. Boettcher & Co., Inc.*, 832 P.2d 967 (Colo. App. 1991).

Evidence of previous drug transactions between defendant and witness admissible to refute witness's testimony that their relationship was casual and pertained only to radio-controlled car racing, where trial court weighed probative value and potential prejudicial effect of evidence before ruling on admissibility. *People v. Miller*, 890 P.2d 84 (Colo. 1995).

Evidence that defendant had supplied witness with methamphetamine was relevant and admissible to refute defendant's claim that she did not knowingly possess controlled substance. *People v. Warren*, 55 P.3d 809 (Colo. App. 2002).

Court properly admitted evidence of defendant's drug dealing. The evidence related to material facts of identity, intent, and motive. The evidence in relation to other evidence at trial tended to show that defendant was the killer. *People v. Sandoval-Candelaria*, ___ P.3d ___ (Colo. App. 2011).

Evidence of victim's letter to the court, over defendant's objection, was not admitted as proof of other acts but was properly admitted solely for impeachment purposes. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), *rev'd* on other grounds, 19 P.3d 15 (Colo. 2001).

Where defense is based on defendant's claim that he acted under duress, the jurors' perceptions regarding his credibility and weight to be given to his testimony substantially affect the outcome of the trial. Under these circumstances, refusal to admit evidence of the defendant's character for truthfulness is grounds for reversal. *People v. Meinerz*, 890 P.2d 130 (Colo. App. 1994).

Court erred in admission of other act evidence. The court wrongfully admitted evidence regarding: (1) Defendant's ownership of other weapons and knives that were unlike the mur-

der knife; (2) defendant's training in martial arts and self-defense; (3) defendant's possession of reading material on martial arts and the use of knives; (4) defendant's drawing from several days after the murder; and (5) defendant's previous two dissimilar bar fights. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Court properly admitted other act evidence regarding defendant's knife and bayonet training and his religious beliefs. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Any error in admitting evidence was harmless beyond a reasonable doubt where such evidence consisted of exhibits denoting a charge originally filed against defendant prior to his entry into a plea agreement on the conviction that formed the basis for his adjudication as a habitual criminal and records from Ohio showing the charges for which defendant was convicted. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Similar transaction evidence held admissible. *People v. Herrera*, 633 P.2d 1091 (1981); *People v. Mason*, 643 P.2d 745 (Colo. 1982); *People v. Adams*, 678 P.2d 572 (Colo. App. 1984); *People v. Montoya*, 703 P.2d 606 (Colo. App. 1985); *People v. Mathes*, 703 P.2d 608 (Colo. App. 1985); *People v. Hogan*, 703 P.2d 634 (Colo. App. 1985); *O'Neal v. Reliance Mortg. Corp.*, 721 P.2d 1230 (Colo. App. 1986); *People v. Conley*, 804 P.2d 240 (Colo. App. 1990); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

Evidence of prior criminal, wrongful, or bad acts perpetrated against others was inadmissible where the defendant failed to testify that he had knowledge of these acts and acted on the basis of that knowledge, and the trial court's rejection of such evidence was not an abuse of discretion. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

No abuse of discretion found in admitting testimony regarding previous explosions not involving defendant when such testimony was briefly elicited during cross-examination of a witness to impeach witness's testimony about the safeness of natural gas and so limited in scope and use. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

It was not impermissible profiling where a psychological theory and analysis, founded on research and study, was used to provide a framework for the crime at hand and to examine and to give context to defendant's previous acts that were independently admissible; evidence was properly admitted since it was neither logically irrelevant nor unduly prejudicial, confusing, misleading, time-consuming, or cumulative. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd* on other grounds, 59 P.3d 979 (Colo. 2002).

Evidence showing that defendant had never been convicted of a crime was not evi-

dence of a “pertinent trait”. Further, nonoccurrence evidence is improper under C.R.E. 405 because it is not in the form of an opinion and it does not describe a specific instance of conduct. *People v. Goldfuss*, 98 P.3d 935 (Colo. App. 2004).

Applied in *People v. Roybal*, 775 P.2d 67 (Colo. App. 1989), cert. denied, 785 P.2d 917

(Colo. 1989); *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), aff’d in part and rev’d in part, 817 P.2d 988 (Colo. 1991); *People v. Adams*, 867 P.2d 54 (Colo. App. 1993); *People v. Collie*, 995 P.2d 765 (Colo. App. 1999); *People v. Cooper*, 104 P.3d 307 (Colo. App. 2004).

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. Except as limited by §§ 16-10-301 and 18-3-407, in cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person’s conduct.

(Federal Rule Identical Except for Statutory Limitation.)

Source: (b) amended September 29, 2005, effective January 1, 2006.

ANNOTATION

Law reviews. For article, “Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview”, see 50 U. Colo. L. Rev. 277 (1979). For article, “The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence”, see 58 U. Colo. L. Rev. 1 (1986-87).

Evidence may show character trait of aggression of victim. When the purpose of the evidence is to show a pertinent character trait of the victim from which it may be inferred that he was the initial aggressor, that trait may be shown by specific instances of past conduct. *People v. Jones*, 635 P.2d 904 (Colo. App. 1981).

But where theory of defense was that homicide was committed in self-defense against a homosexual assault and the victim’s alleged homosexuality itself would not prove an element of self-defense, evidence of the victim’s homosexuality could only be introduced via reputation or opinion evidence, not via a specific instance of conduct. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).

Reputation and rumor distinguished. *People v. Erickson*, 883 P.2d 511 (Colo. App. 1994).

Evidence in the form of reputation or opinion concerning a witness’ character for truthfulness may be introduced to support the credibility of the person when the witness’ character for truthfulness has been attacked; however, such testimony must be based on opinion

held generally in a broad community. *People v. Ayala*, 919 P.2d 830 (Colo. App. 1995).

Reputation is distinguished from rumor in that it must be established over a period of time. *People v. Ayala*, 919 P.2d 830 (Colo. App. 1995).

Trial court has the responsibility to ensure that an adequate foundation has been laid for the introduction of reputation evidence. *People v. Erickson*, 883 P.2d 511 (Colo. App. 1994).

Defendant’s offer of proof, consisting of opinions of two unnamed declarants, regarding victim’s sexual orientation was mere rumor and not admissible as evidence of reputation in the community. *People v. Erickson*, 883 P.2d 511 (Colo. App. 1994).

Improper use of character evidence by permitting the prosecution to present evidence regarding the violent character of defendant’s witnesses, purportedly in order to challenge their testimony regarding defendant’s nonviolent character, was not objected to at trial court level on grounds of improper character evidence, and under standard of plain error, the admission of the improper character evidence did not so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), rev’d on other grounds, 48 P.3d 520 (Colo. 2002).

Applied in *People v. Jones*, 675 P.2d 9 (Colo. 1984); *People v. Thomas*, 694 P.2d 1280 (Colo. App. 1984).

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(*Federal Rule Identical.*)

ANNOTATION

Law reviews. For article, "Rule 406: Admissibility of Evidence Of Habit or Routine Practice", see 23 Colo. Law. 2747 (1994).

Rationale behind rule. In case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing, than that he acted otherwise. *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982).

Testimony that a person is a "cautious driver" is character evidence under CRE 404 and not habit evidence under this rule. *People v. T.R.*, 860 P.2d 559 (Colo. App. 1993).

Applied in *Bloskas v. Murray*, 44 Colo. App. 480, 618 P.2d 719 (1980); *Columbia Sav. and Loan Ass'n v. Zelinger*, 794 P.2d 231 (Colo. 1990).

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(*Federal Rule Identical.*)

COMMITTEE COMMENT

The phrase "culpable conduct" is not deemed to include proof of liability in a "strict liability" case based on defect, where the sub-

sequent measures are properly admitted as evidence of the original defect. *But see* § 13-21-404, C.R.S. (1978 Supp.).

ANNOTATION

Law reviews. For article, "Rule 407: Subsequent Remedial Measures?", see 20 Colo. Law. 895 (1991). For article, "Applicability of C.R.E. 407 In Federal Court", see 34 Colo. Law. 77 (January 2005).

This rule is applicable in product liability cases involving allegation of inadequate warnings. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986).

The "feasibility of precautionary measures" exception to this rule is applicable when the defendant contests the feasibility of precautionary measures at the time of the incident. Evidence of "subsequent remedial measures" may be used to impeach testimony that precautionary measures were not feasible at the time of the incident. *Duggan v. Weld County Bd. of Comm'rs*, 747 P.2d 6 (Colo. App. 1987).

Testimony as to subsequent remedial measures proper for impeachment. In a slip and fall case, where landlord testified to changes in a ditch owned by the landlord only prior to the

time of the fall, questioning concerning whether landlord had previously testified that changes occurred after the fall was for impeachment purposes and was proper under this rule. *Vallejo v. Eldridge*, 764 P.2d 417 (Colo. App. 1988).

Evidence of subsequent remedial measures is admissible as evidence concerning the issue of visibility of the obstacle and to impeach expert on that issue. *Martinez v. W.R. Grace Co.*, 782 P.2d 827 (Colo. App. 1989).

Evidence that one of the defendants had recommended installation of air inlet shutoff devices on gas hauling trucks fell within one of the exceptions of the rule. In light of defense offered by defendants that the devices create a hazard rather than a safety feature when used on truck engines, the evidence directly impeached the contention of the defendants. *White v. Caterpillar, Inc.*, 867 P.2d 100 (Colo. App. 1993).

Evidence that, after plaintiff's accident, defendant changed its manual to move a

warning from the end of a section to the beginning of the same section is excluded. To the extent that this evidence was offered to prove negligence or culpable conduct, it was not admissible. *White v. Caterpillar, Inc.*, 867 P.2d 100 (Colo. App. 1993).

Only measures which take place after the "event" are excluded under this rule. *Combined Com. Corp. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993).

Evidence of subsequent remedial measures may be admitted to prove feasibility of precautionary measures, if that issue is controverted. *Biosera, Inc. v. Forma Scientific, Inc.*,

941 P.2d 284 (Colo. App. 1996), *aff'd*, on other grounds, 960 P.2d 108 (Colo. 1998).

The provisions of this rule do not apply in strict liability claims that are premised on a design defect theory. The explicit language of the rule does not permit the exclusion of evidence of remedial actions in strict liability claims premised on design defect because the manufacturer's conduct, whether culpable or negligent, is not germane. *Forma Scientific, Inc. v. Biosera, Inc.*, 960 P.2d 108 (Colo. 1998).

Applied in *Larsen v. Archdiocese of Denver*, 631 P.2d 1163 (Colo. App. 1981).

Rule 408. Compromise and Offers to Compromise

(a) **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

(*Federal Rule Identical.*)

Source: Entire rule amended and effective September 27, 2007.

ANNOTATION

Law reviews. For article "ADR: Explanations, Examples and Effective Use", see 18 Colo. Law. 843 (1989). For article, "Admissibility of a Party's Own Settlement Offer", see 21 Colo. Law. 1893 (1992).

This rule applies to every offer of settlement and makes such offers inadmissible to prove liability. Therefore, the rule does not impose a condition on an offer of settlement. Further, an offer may be admissible under this rule for purposes other than to prove liability. *Dillen v. HealthOne, L.L.C.*, 108 P.3d 297 (Colo. App. 2004).

Whether the statements contained in a letter plaintiff's counsel had written were actually made in the course of a "settlement negotiation" or "compromise" is a question of fact, and since there was evidentiary support for the trial court's finding that the letter was part of an effort to compromise the plaintiff's claims, that finding is binding on appeal. *H&H Distributors v. BBC Intern.*, 812 P.2d 659 (Colo. App. 1991).

Even if the letter plaintiff's counsel had written constituted an "admission of fact",

plaintiff's "admission" would be excludable under CRE 408 because it was made in a letter offering to settle the dispute. *H&H Distributors v. BBC Intern.*, 812 P.2d 659 (Colo. App. 1990).

A document entitled "Settlement Detail" was admissible because it was a status report for defendant's use in the ordinary course of business, not for the purpose of discussing settlement with plaintiff. *Scott Co. of California v. MK-Ferguson*, 832 P.2d 1000 (Colo. App. 1991).

Situations in which someone acknowledges that a certain claim is valid or is valid to a certain extent, or statements to the effect: "I think your claim is worth 'X' number of dollars," are not offers within the meaning of CRE 408. *Scott Co. of California v. MK-Ferguson*, 832 P.2d 1000 (Colo. App. 1991).

The threshold question, which is a question of fact for the trial court, is whether the conduct or statements were made in settlement negotiations, for if they were not, the rule is inapplicable. *Scott Co. of California v. MK-Ferguson*, 832 P.2d 1000 (Colo. App. 1991).

Evidence supported trial court's finding and was binding on appeal that the document was admissible because it was a status report prepared for defendants' use in the ordinary course of business, not for the purpose of discussing settlement with plaintiff. *Scott Co. of California v. MK-Ferguson*, 832 P.2d 1000 (Colo. App. 1991).

No error in admitting statements by plaintiff that a representative of defendants stated

that he felt plaintiff's claims had merit in certain amount where court stated that situations in which someone acknowledges that a certain claim is valid or is valid to a certain extent, or statements to the effect: "I think your claim is worth 'X' number of dollars," are not offers within the meaning of this rule. *Scott Co. of California v. MK-Ferguson*, 832 P.2d 1000 (Colo. App. 1991).

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(Federal Rule Identical.)

ANNOTATION

Evidence of defendant's offer to pay a plaintiff's medical expenses not admissible to establish liability. *Bonser v. Shainholtz*, 983

P.2d 162 (Colo. App. 1999), rev'd on other grounds, 3 P.3d 422 (Colo. 2000).

Rule 410. Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty

Except as otherwise provided by statutes of the State of Colorado, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in any connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

This rule shall be superseded by any amendment to the Colorado Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the effective date of these Colorado Rules of Evidence.

COMMITTEE COMMENT

The Committee wishes to advise the Court of a proposed Federal Amendment to Rule 410 as follows:

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not admissible against the person who made the plea or was a party to the discussions, in any civil or criminal proceeding:

(1) a plea of guilty which was later withdrawn;

(2) a plea of *nolo contendere*;

(3) plea discussions with the attorney for the government, concerning the crime charged

or any other crime, which do not result in a plea of guilty or which result in a plea of guilty later withdrawn; or

(4) statements made in the course of or as a consequence of such pleas or plea discussions. However, such a statement is admissible in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FRE ADVISORY COMMITTEE NOTE: Present Rule 410 conforms to Rule 11(e)(6) of

the Federal Rules of Criminal Procedure. A proposed amendment to Rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmis-

sible in evidence; *see* Advisory Committee Note thereto. The amendment proposed above would make comparable changes in Rule 410.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", *see* 50 U. Colo. L. Rev. 277 (1979).

Application of this rule, when read in light of Crim. P. 11 (e)(6) and § 16-7-303, requires the exclusion of evidence of statements made by defendant during plea bargaining process only in regard to plea discussions with the attorney for the government. *People v. Rollins*, 759 P.2d 816 (Colo. App. 1988).

While the prosecuting attorney need not be physically present, his or her knowledge and consent to be bound by the plea discussions is an essential prerequisite to application of the rule. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Defendant's unilateral choice to provide statements to law enforcement officers unauthorized to conduct plea negotiations failed to transform the statements into disclosures made "in any connection with" any offers to plead guilty. Such statements, therefore, did not fall within the ambit of this rule. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Since this rule is substantially the same as Fed. R. Evid. 410, absent case authority in Colorado, federal cases on issue of whether a statement by defendant constitutes an inadmissible statement during plea negotiations are instructive in interpretations of this rule. *People v. Rollins*, 759 P.2d 816 (Colo. App. 1988).

"Conviction" as used in the habitual offender statute, includes a judgment of conviction entered upon a plea of *nolo contendere*. *People v. Windsor*, 876 P.2d 55 (Colo. App. 1993).

In the context of the bail bond statute, a plea of guilty, when accepted by the court which grants a deferred judgment and sentence, constitutes a "conviction". Evidence of the guilty plea is no longer admissible, however, after successful completion of the period of the deferred sentence. *Hafelfinger v. District Court*, 674 P.2d 375 (Colo. 1984).

A letter from the defendant to the county court judge constitutes an offer to plead *nolo contendere* to the crime charged and, therefore, should not have been admitted where the letter stated that the defendant did not want to contest the charges against him, that he did not wish to remain free, and that he hoped the court would exercise mercy and send him to a minimum security facility. *People v. Flores*, 902 P.2d 417 (Colo. App. 1994).

Where defendant was the first to refer to his initial insanity plea, he could not claim error when the court allowed the prosecution to explore his insanity plea. *People v. Kruse*, 819 P.2d 548 (Colo. App. 1991).

This rule does not bar the introduction, for impeachment purposes, of voluntary statements made to prosecutors after the acceptance of a plea agreement and the plea is subsequently withdrawn. *People v. Butler*, 929 P.2d 36 (Colo. App. 1996).

Sua sponte hearing on voluntariness not required, if there is no basis in the record for concluding the voluntariness of statements might be challenged. *People v. Copenhaver*, 21 P.3d 413 (Colo. App. 2000).

Statements in the court file, including defendant's written statement in support of a rejected plea agreement, are "on the record" and may be used for impeachment purposes. *People v. Copenhaver*, 21 P.3d 413 (Colo. App. 2000).

Defendant's statements made during polygraph not admissible under this rule when polygraph conducted as part of plea negotiation. Here, prosecution asked defendant to take a polygraph to see "what type of plea may or may not be made", thus constituting part of a plea negotiation; therefore, defendant is entitled to the implied promise of this rule. *People v. Garcia*, 169 P.3d 223 (Colo. App. 2007).

Statements defendant made in a federal case in accepting guilty plea and not in allocation for purposes of sentencing are admissible against the defendant in a state court case. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Rule 411: Permitting Evidence of Insurance to Show Witness Bias", see 30 Colo. Law. 41 (January 2001). For article, "Rule 411: Excluding Evidence of Insurance Offered to Show Witness Bias", see 38 Colo. Law. 17 (January 2009).

Allusion to insurance coverage improper. Evidence of a party's liability insurance is irrelevant to the question of whether he acted negligently or otherwise, and as such, any allusion to insurance coverage is improper. *Prudential Prop. & Cas. Ins. Co. of Am. v. District Court*, 617 P.2d 556 (Colo. 1980); *Jacob v. Com. Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986).

However, mere inadvertent or incidental mention of insurance before the jury does not automatically call for a mistrial. Unless prejudice is shown, there is no reversible error in

denying a mistrial. *Jacob v. Com. Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986).

Court properly denied mistrial motion where party, rather than counsel, made incidental reference to insurance, counsel did not exploit the reference, party was promptly admonished by counsel, the court outside the presence of the jury ordered counsel to avoid any future reference to the existence of insurance, and movant failed to request jury instruction to disregard testimony. *Miller v. Rowtech, LLC*, 3 P.3d 492 (Colo. App. 2000).

And the fact that the defendant's expert witness had a "substantial connection" with the defendant's insurer is probative of bias, and admission of evidence of such connection was within the trial court's discretion. *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000).

Rule 412. (No Colorado Rule Codified)

COMMITTEE COMMENT

See 18-3-407, C.R.S.

(Adopted March 5, 1981, effective July 1, 1981.)

ARTICLE V
PRIVILEGES

Rule 501. Privileges Recognized Only as Provided

Except as otherwise required by the Constitution of the United States, the Constitution of the State of Colorado, statutes of the State of Colorado, rules prescribed by the Supreme Court of the State of Colorado pursuant to constitutional authority, or by the principles of the common law as they may be interpreted by the courts of the State of Colorado in light of reason and experience, no person has a privilege to:

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

ANNOTATION

Law reviews. For comment "Reporter's Privilege: *Pankratz v. District Court*", see 58 Den. L.J. 681 (1981). For article, "Rule 501: The Privilege of Self-Critical Analysis", see 24 Colo. Law. 1291 (1994).

Rule applies to all stages of an action and is applicable to pretrial discovery. *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

Third persons may testify to overheard confidential conversations. If parties sustaining confidential relations to each other hold their conversation in the presence and hearing

of third persons, whether they be necessarily present as police officers or indifferent bystanders, such third persons are not prohibited from testifying to what they heard. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

News reporter has no privilege to refuse to respond to subpoena. Where a news reporter, who is a first-hand observer of criminal conduct, is subpoenaed to testify and to produce relevant documents in the course of a valid grand jury investigation or criminal trial, there is no privilege under the Colorado constitution

to refuse to respond to a subpoena. Pankratz v. District Court, 199 Colo. 411, 609 P.2d 1101 (Colo. 1980).

Hospital inspection committees' privilege not expanded. Absent legislative action and in light of the general policy favoring liberal dis-

covery, the public interest in the confidentiality of hospital inspection committees is insufficient to warrant judicial expansion of the privilege contained in § 12-43.5-102(3)(e). *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

ARTICLE VI WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules, or in any statute of the State of Colorado.

COMMITTEE COMMENT

The present rule preserves the general Colorado rule under § 13-90-101, *et seq.*, C.R.S.;

and the exceptions listed in §§ 13-90-102 through 13-90-108.

ANNOTATION

Law reviews. For article "The Child Witness", see 22 Colo. Law. 1201 (1993).

Determination within trial court's discretion. Determination of the competency of a witness is a matter within the trial court's discretion. *People v. District Court*, 647 P.2d 1206 (Colo. 1982).

Testimonial incapacity due to age is not a bar to admission of a hearsay statement which would otherwise be admissible in evidence as *res gestae*. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

Witness presumed competent when never adjudicated insane. *People v. Galloway*, 677 P.2d 1380 (Colo. App. 1983).

A witness's intoxication, alone, is not sufficient to determine that the witness is incompetent to testify. There is nothing in the record that indicated the witness lacked the capacity to observe, recollect, communicate, and understand the oath to tell the truth. The witness was thoroughly cross-examined by defense counsel and the court informed the jury of the witness's intoxication status. There was no error in allowing the witness's testimony. *People v. Alley*, 232 P.3d 272 (Colo. App. 2010).

Further, a witness's intoxication, alone, does not require the court to conduct a competency hearing. The court has wide latitude to determine whether to admit an intoxicated witness's testimony and it is the jury's role to determine the witness's credibility. *People v. Alley*, 232 P.3d 272 (Colo. App. 2010).

Procedures for cases involving posthypnotic testimony are as follows: (1) Party intending to elicit such testimony at trial should timely advise opposing party of that fact and make available for inspection any records dealing with the hypnosis sessions. (2) The propo-

nent of the testimony bears the burden of establishing the reliability of such testimony whenever a challenge is made to its admissibility. (3) The preponderance of evidence is the suitable standard for resolving this issue. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Hypnotized witness competent to testify to statements made prior to hypnosis if there is an accurate record of prehypnotic recollection which helps insure reliability. *People v. Angelini*, 706 P.2d 2 (Colo. App. 1985).

Posthypnotic testimony. Trial courts must make an individualized inquiry in each case to determine whether the trial testimony of a witness who has been hypnotized will be sufficiently reliable to qualify for admission. This rule is incompatible with either a *per se* rule of admissibility or a *per se* rule of inadmissibility. To the extent that *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982), adopts such a *per se* rule of inadmissibility, it is expressly overruled. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

The central inquiry at a challenge to admissibility is whether, notwithstanding the events occurring during the hypnosis session, the witness' trial testimony will be sufficiently reliable to be admissible. The trial court should consider the totality of circumstances bearing on the issue of reliability and should make adequate findings so as to permit meaningful appellate review. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Witness who has been hypnotically relaxed without questioning or suggestion has not

thereby been rendered incompetent to testify, although evidence of relaxation technique may be used to impeach witness' credibility. *People v. McKeehan*, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988).

Applied in *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Admissibility of Governmental Studies to Prove Causation", see 11 Colo. Law. 1822 (1982). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002).

This rule is a specialized application of CRE 104(b) regarding conditionally relevant evidence. In a personal injury case by a husband against his employer, the question of whether the husband's spouse had personal knowledge as to the husband's admissions regarding the fraudulent nature of his claim was for the jury to determine in accordance with CRE 104(b). The trial court erred in not admitting, as conditionally relevant evidence, testimony of a wife as to admissions made by the wife's spouse about the fraudulent nature of his personal injury claim against his employer even though there was an issue about whether the admission was actually made by the spouse or based on the wife's dream. The proper analysis by the court in determining the admissibility of the wife's testimony should have been whether the jury could reasonably find by a preponderance of the evidence that the conditional fact, i.e. that the wife had personal knowledge of admissions made by her spouse regarding the

fraudulent nature of his claim. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

The threshold for establishing the personal knowledge requirement is not very high and may be inferable from sources other than the witness and from the total circumstances surrounding the matter that is the subject of the witness's testimony. As long as there is evidence before the trial court such that the jury could reasonably find that the witness has personal knowledge of the event, the witness should be permitted to testify and the question of credibility and weight should be left for the jury to resolve. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).

Where the witness was not qualified as an expert and the witness had no personal experience with the maintenance expenses on the property, evidence presented as to the amount of future maintenance expenses was legally insufficient. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993).

Applied in *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981); *Nat'l Sur. Corp. v. Citizens State Bank*, 651 P.2d 460 (Colo. App. 1982); *Graham v. Lombardi*, 784 P.2d 813 (Colo. App. 1989).

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

(Federal Rule Identical.)

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

(Federal Rule Identical.)

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

(Federal Rule Identical.)

Rule 606. Competency of Juror as Witness

(a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Source: Entire rule amended and effective and committee comment added and effective September 27, 2007.

COMMITTEE COMMENT

Rule 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule, providing that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The federal amend-

ment responded to a divergence between the text of the Rule and the case law that had established an exception for proof of clerical errors. See Fed. R. Evid. 606(b) advisory committee notes (2006 Amendments); see also Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

ANNOTATION

Law reviews. For article, "Rule 606(b): Competency of Jurors as Witnesses", see 25 Colo. Law. 47 (March 1996). For article, "Admissibility of Juror Affidavits Under C.R.E. 606(b)", see 32 Colo. Law. 61 (March 2003). For article, "People v. Harlan: The Colorado Supreme Court Takes a Step Toward Eliminating Religious Influence on Juries", see 83 Den. U.L. Rev. 613 (2005).

Purpose of this rule is to reinforce the finality of jury verdicts, to protect the sanctity of jury deliberations, and to safeguard the privacy of jurors; however, in cases where result of jury deliberations are substantially undermined due to fundamental flaws in deliberation process, courts must weigh these policies against overriding concern that parties to judicial process be assured of fair result. Ravin v. Gambrell By and Through Eddy, 788 P.2d 817 (Colo. 1990).

Section (b) of this rule has three fundamental purposes: To promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Section (b) allows juror testimony on the question of whether extraneous prejudicial information was improperly brought to the jurors' attention. People v. Harlan, 109 P.3d 616 (Colo. 2005).

The common law in Colorado supports a plain meaning application of section (b) and its two stated exceptions. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Section (b) precludes the use of jurors' post-verdict statements to the court to impeach the unanimous verdict. Granting of new trial based upon jurors statements improper even if statements made prior to the jury being disbursed. Hall v. Levine, 104 P.3d 222 (Colo. 2005).

This rule contains no exception for clerical error. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

An exception to the rule that a trial court cannot reconvene a discharged jury applies when the jury has not yet dispersed, there is no evidence that the jury has been subjected to outside influences from the time of the initial

discharge to the time of re-empanelment, and the jury remains under the de facto control of the court. It was appropriate to modify a judgment that relied on an ambiguous verdict form based on the proceedings following the discharge of the jury because the foregoing requirements were met. *Hanna v. State Farm Ins. Co.*, 169 P.3d 267 (Colo. App. 2007).

Jury foreman's statements concerning a possible clerical mistake in filling out dollar amounts of verdict forms held not precluded by this rule. *Kading v. Kading*, 683 P.2d 373 (Colo. App. 1984).

Manner in which district court polled jury regarding perceived inconsistent verdicts exceeded the bounds of section (b). Court violated rule by engaging in a detailed and lengthy conversation with the jury regarding its deliberative confusion. Where none of the rule's exceptions applied, the manner of the court's questioning of the jury was obviously erroneous as it resulted in impermissible jury testimony that revealed the mental processes of the jurors. *People v. Juarez*, 271 P.3d 537 (Colo. App. 2011).

A two-part inquiry determines whether extraneous prejudicial information was improperly brought to the jurors' attention. First, the court decides whether extraneous information was improperly before the jury, and then, second, based on the objective "typical juror" standard, the court determines whether use of the extraneous information posed a reasonable probability of prejudice to the defendant. This inquiry is a mixed question of law and fact. The appellate court defers to the trial court's findings of historical facts if supported by competent evidence and reviews the conclusions of law de novo. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Extraneous information encompasses any information that is not properly received into evidence or included in the court's instructions. Extraneous information is improper whether or not the court specifically warned against its use. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Competent evidence supports the trial court's finding that the jury considered extraneous information in the jury room in the form of Bible passages related to the death penalty. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Jurors may rely on their professional and educational expertise to inform their deliberations so long as they do not bring in legal content or specific factual information learned from outside the record. *Kendrick v. Pippin*, 252 P.3d 1052 (Colo. 2011).

Juror's pre-existing personal expertise or knowledge of a general nature does not constitute extraneous information. Juror may use his or her particular pre-existing knowledge of mathematics to analyze admitted evidence of

relevant locations and distances and the speed of defendant's vehicle. *Kendrick v. Pippin*, 222 P.3d 391 (Colo. App. 2009), rev'd on other grounds, 252 P.3d 1052 (Colo. 2011).

Juror's statement during deliberations regarding the severity of a charged offense does not constitute extraneous information because the statement was based on the juror's general knowledge or personal experience. Therefore, the statement cannot be used to impeach the verdict. *People v. Holt*, 266 P.3d 442 (Colo. App. 2011).

In order to determine whether improper introduction of extraneous information into the jury room created a reasonable possibility that the jury's verdict was influenced to the detriment of the defendant, the following factors may be considered: (1) How the extraneous information relates to critical issues in the case; (2) how authoritative the source consulted is; (3) whether a juror initiated the search for extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous decision; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

A reasonable possibility exists that Bible material introduced into the jury room could have influenced a typical juror to vote for the death penalty instead of a life sentence; therefore, the defendant was prejudiced, and the death penalty sentence must be vacated. *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Use of dictionary by a juror to obtain a definition of the crime with which the defendant was charged was improper and constituted misconduct. *Wiser v. People*, 732 P.2d 1139 (Colo. 1987).

However, defendant bears the burden of proving that use of a dictionary definition posed a reasonable possibility of prejudice to him. *People v. Holt*, 266 P.3d 442 (Colo. App. 2011).

Juror's use of the internet to obtain information about a drug prescribed to the defendant was improper and constituted misconduct. *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), aff'd on other grounds, 97 P.3d 932 (Colo. 2004).

Inquiry by juror about source of jury instructions to friend who was a legal secretary was misconduct which had potential for distorting the deliberations of the jury. *Wiser v. People*, 732 P.2d 1139 (Colo. 1987).

Section (b) bars a court from considering juror affidavits if they do not address matters within the two stated exceptions: Extraneous prejudicial information improperly brought to the juror's attention or improper outside influence exerted upon a juror. *Stewart v. Rice*, 47

P.3d 316 (Colo. 2002); *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

A jury verdict may not be impeached by affidavit except in very limited circumstances involving external influence improperly bearing upon the jury. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

A jury verdict in a criminal case may not generally be impeached by affidavits of jurors unless there has been external influence on the jury or there has been jury misconduct. *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Defendant convicted of theft by receiving may not use affidavit of jury foreman to show that jury's finding regarding value of items involved in theft was based on speculation. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

Affidavits concerning jurors' mental processes held inadmissible. *Rome v. Gaffrey*, 654 P.2d 333 (Colo. App. 1982); *People v. Collins*, 730 P.2d 293 (Colo. 1986); *Ravin v. Gambrell By and Through Eddy*, 788 P.2d 817 (Colo. 1990); *Davis v. Lira*, 817 P.2d 539 (Colo. App. 1991), rev'd on other grounds, 832 P.2d 240 (Colo. 1992).

Juror's affidavit about her physical condition and her position as holding out alone against other jurors cannot be received under this rule. *Gambrell By and Through Eddy v. Ravin*, 764 P.2d 362 (Colo. App. 1988), aff'd, 788 P.2d 817 (Colo. 1990).

Juror's affidavit and testimony about her physical condition and its effect on her ability to hold out against the other jurors' yelling constituted an improper inquiry into her thought processes and emotions and was, therefore, inadmissible. *People v. Ferrero*, 874 P.2d 468 (Colo. App. 1993).

Juror's affidavits concerning mental processes in determining the amount of the verdict, including specific statements that the damages awarded were to pay for the plaintiff's attorney fees were not admissible and could not be used to impeach the jury award. *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126 (Colo. App. 1998).

Trial court properly considered affidavit alleging coercion against a juror and hearing testimony from juror who asserted the misconduct. *People v. Collins*, 730 P.2d 293 (Colo. 1986).

Testimony concerning jurors' mental processes held inadmissible and such testimony cannot serve as basis for denial of defendant's postconviction motion. *People v. Crespin*, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

Witness' testimony as to the juror's fear was an improper inquiry into the juror's thought processes and emotions and was, therefore, in-

admissible. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987).

Testimony at hearing as to the jurors' emotional reactions to extraneous information was excludable as improper inquiry into the jurors' thought processes and emotions during deliberations. *People v. Ferrero*, 874 P.2d 468 (Colo. App. 1993).

Court may only consider evidence of objective circumstances and overt coercive acts by other members of jury and may not consider the effect this conduct had on the minds of the jurors. *People v. Rudnick* 878 P.2d 16 (Colo. App. 1993).

A juror may not testify as to the wrong exercise of his judgment or his confusion on the law or the facts or his misunderstandings. *People v. Collins*, 730 P.2d 293 (Colo. 1986).

Courts are precluded by section (b) from engaging in direct post-verdict investigations into the deliberative processes of jurors. *Wilson v. O'Reilly*, 867 P.2d 92 (Colo. App. 1993).

But where court simply asked the juror if this in fact was her verdict and where only the juror's answers to the court's questions discussed the jury's deliberations, court's actions were consistent with section (b). *People v. Barnard*, 12 P.3d 290 (Colo. App. 2000).

When juror was questioned about whether the verdict in favor of defendant as reported by a written special verdict was her verdict and juror responded "no", judge should have declared a mistrial or directed the jurors to deliberate further; by engaging in extended questioning as to why the juror had said the verdict was not hers, the court and counsel improperly delved into the deliberations and mental processes of the jurors and risked unduly influencing the juror to conform to the signed verdict. *Simpson v. Stjernholm*, 985 P.2d 31 (Colo. App. 1998).

Trial court erred by failing to strike affidavit of juror in which he stated he dissented from the jury's award because he thought the award inadequate. *Neil v. Espinoza*, 747 P.2d 1257 (Colo. 1987).

Rule applicable to the impeachment of a certificate of ascertainment and assessment in eminent domain proceedings. *Aldrich v. District Court*, 714 P.2d 1321 (Colo. 1986).

To prevail on motion for new trial on basis of juror testimony alleging misconduct, movant must establish he was prejudiced by the misconduct. *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984); *Wiser v. People*, 732 P.2d 1139 (Colo. 1987); *People v. Garcia*, 752 P.2d 570 (Colo. 1988); *Ravin v. Gambrell By and Through Eddy*, 788 P.2d 817 (Colo. 1990); *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), aff'd on other grounds, 97 P.3d 932 (Colo. 2004).

Test for setting aside jury verdicts in both civil and criminal actions is not whether the

impropriety actually influenced a juror, but whether it had the capacity of doing so. *Ravin v. Gambrell By and Through Eddy*, 778 P.2d 817 (Colo. 1990).

One seeking to set aside a verdict based on allegations of improper extraneous influence on the jury must establish the fact of such influence and also that there was a reasonable possibility of prejudice. *Wilson v. O'Reilly*, 867 P.2d 92 (Colo. App. 1993).

Evidentiary hearing on jury misconduct. In order to constitute grounds for setting aside a verdict because of any unauthorized or improper communication with the jury, it is incumbent upon defendant to show that he was prejudiced thereby. The determination of whether prejudice has occurred is a matter within the sound discretion of the trial court. *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986); *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Review of whether a new trial is required because of juror misconduct is a mixed question of law and fact. The court must apply a normal deferential standard to the trial court's factual findings, but review de novo the trial court's conclusions of law. *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

Defendant not entitled to a new trial as a result of influence upon two jurors by other jurors absent evidence of threats, abuse, or any coercion beyond mere argumentation. *People v. Black*, 725 P.2d 8 (Colo. App. 1986).

To prevail on a motion for a new trial based on exposure of jurors to extraneous information or influences, defendant must establish that he was prejudiced by the exposure. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987).

Prejudice is shown if the jurors' exposure to extraneous information or influences establishes a reasonable possibility that the extraneous information affected the verdict. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987).

However, defendant cannot claim prejudice resulting from his own conduct as a ground for setting aside the verdict. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987).

In determining whether a new trial is required due to juror misconduct, the court must determine whether there is a reasonable possibility that the extraneous contact or influence affected the verdict, so as to require a new

trial only where there is a reasonable possibility that verdict was tainted by introduction of outside information or influences into jury deliberations. *Wiser v. People*, 732 P.2d 1139 (Colo. 1987); *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

New trial required where there was reasonable possibility that jury verdict was affected by bailiff's remark that if a verdict could not be reached the judge might make jury deliberate for up to two weeks. *Gambrell By and Through Eddy v. Ravin*, 764 P.2d 362 (Colo. App. 1988), aff'd, 788 P.2d 817 (Colo. 1990).

Trial court erred by failing to consider part of a juror's affidavit discussing another juror's potential misrepresentation or concealment of prejudicial beliefs during voir dire. *Black v. Waterman*, 83 P.3d 1130 (Colo. App. 2003).

Trial court properly considered affidavits of three jurors in determining whether an envelope containing defendant's suppressed statement which had been accidentally taken to the jury room affected the jury's determination. *People v. Smith*, 856 P.2d 26 (Colo. App. 1992).

Trial court abused its discretion in denying a motion for new trial which was filed because the jury foreman obtained extraneous information that was pertinent to the issue of the credibility of the accused versus the victim. *People v. Fox*, 862 P.2d 1000 (Colo. App. 1993).

Trial court erred in granting a new trial based on the jury's supposed mental processes. Despite any initial appearance of confusion, once a jury has rendered a consistent final verdict it is inappropriate to set aside the verdict because of the court's speculation that the confusion may have continued. *People v. Angell*, 917 P.2d 312 (Colo. App. 1995).

Rule applicable to deliberations prior to a verdict. The integrity of jury deliberations and assurance that jurors will be protected from coercion are no less important in the process of attempting to reach a verdict than they are in the process of polling a jury once the verdict is reached. To hold otherwise would disserve the purpose of section (b) and expose individual jurors to potential harassment or pressure that the rule was designed to avoid. *People v. Rivers*, 70 P.3d 531 (Colo. App. 2002).

Applied in *T.S. v. G.G.*, 679 P.2d 118 (Colo. App. 1984); *People v. Cornett*, 685 P.2d 224 (Colo. App. 1984); *People v. Mollaun*, 194 P.3d 411 (Colo. App. 2008).

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him. Leading questions may be used for the purpose of attacking such credibility.

COMMITTEE COMMENT

This rule abandons the traditional position against impeaching one's own witness. The additional sentence in the Colorado version of the rule should assist in resolving conflicts now existing between Rule 43(b) of the Colorado Rules of Civil Procedure and § 13-90-116, C.R.S. A minority opinion concerning Rule 607 feels that this rule should be restricted to civil

cases since it may be prosecutorial misconduct for a prosecutor to attack the credibility of his own witness without a showing of hostility or surprise. The likelihood of a defendant's being found guilty because of a "coparticipant" hesitation to testify against the defendant may prejudice the jury to such an extent that a fair trial cannot be obtained.

ANNOTATION

Law reviews. For article, "Admissibility of a Witness's Mental Health History for Purposes of Impeachment", see 21 Colo. Law. 1405

(1992). For article, "Impeachment", see 22 Colo. Law. 1207 (1993).

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in § 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(Federal Rule Identical.)

Source: (b) amended September 29, 2005, effective January 1, 2006.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Impeachment", see 22 Colo. Law. 1207 (1993). For article, "C.R.E. 608(b): Challenging Witness Credibility", see 29 Colo. Law. 99 (July 2000). For article, "Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness", see 35 Colo. Law. 37 (December 2006).

Common-law rule. Prior to the adoption of the Colorado rules of evidence, Colorado adhered to the general rule that evidence of misdeeds was inadmissible for the purpose of attacking a witness' character in regard to his truthfulness. *People v. Saldana*, 670 P.2d 14 (Colo. App. 1983).

While this rule allows for extrinsic evidence under certain circumstances, the adoption of

this rule has not materially altered the previously established general rule. *People v. Saldana*, 670 P.2d 14 (Colo. App. 1983).

Right to confront and cross-examine witnesses not absolute. An accused's constitutional right to confront and to cross-examine witnesses is not absolute and may be limited to accommodate other legitimate interests in the criminal trial process. *People v. Cole*, 654 P.2d 830 (Colo. 1982).

Trial court properly limited cross-examination where answers sought by defendant involved cumulative or collateral testimony concerning co-defendant's credibility and were only marginally related to commission of charged crime. *People v. Ray*, 109 P.3d 996 (Colo. App. 2004).

Bias on the part of a witness is a state of mind and only those demands which can influ-

ence the mind at the moment of testifying are relevant to a demonstration of bias. *People v. Simmons*, 182 Colo. 350, 513 P.2d 193 (1973).

Impeachment inquiry directed to witness' credibility, not character. In impeaching a witness, the inquiry ought to be directed to the witness' credibility rather than to his moral character. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

Rule applies only to the admissibility of character evidence. Proffered evidence of whether a witness was testifying truthfully in the case did not constitute a general character attack on witness. *People v. Hall*, 107 P.3d 1073 (Colo. App. 2004).

Cross-examination held to be proper attack upon witness's credibility, not his character. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

The exclusion of proper opinion testimony is harmless where the defense can fully cross-examine the witness whose credibility was to be impeached, and where that witness's credibility was otherwise impeached through the testifying witness. *People v. Davis*, __ P.3d __ (Colo. App. 2010).

Defendant who takes witness stand is subject to same tests of credibility as any other witness. *People v. Neal*, 181 Colo. 341, 509 P.2d 598 (1973).

Defendant may be examined on previous felony convictions. A defendant who elects to be a witness in his own behalf in a criminal case subjects his credibility to question, like any other witness, and he may therefore be examined on the matter of previous felony convictions. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Nature of particular crime for which defendant was convicted. Although evidence of prior felony convictions is admissible to impeach a defendant who voluntarily takes the stand and testifies in his own behalf, such an inquiry is not confined to the mere fact of the conviction of some crime, but the nature or name of the particular crime of which the witness was convicted may be brought out. *Mays v. People*, 177 Colo. 92, 493 P.2d 4 (1972).

Where defendant testifies, motion to suppress prior conviction denied. The denial of the defendant's motion to suppress his prior felony conviction is proper where the defendant takes the witness stand to testify. *People v. Neal*, 181 Colo. 341, 509 P.2d 598 (1973).

Where, before the defendant testifies in his defense, he moves that the court prohibit the prosecution from showing on cross-examination that he has been previously convicted of a felony, the court correctly denies the motion to suppress as it is without discretion to prohibit such evidence. *People v. Bueno*, 183 Colo. 304, 516 P.2d 434 (1973).

Defendant's past crimes may be used to discredit defendant's witness. Where a defendant places a psychiatrist on the stand to testify that the defendant is a person unlikely to commit the crime in question, it is not error to permit the district attorney, in an effort to discredit this testimony, to refer to the defendant's past criminal behavior in an effort to discredit the psychiatrist's testimony during cross-examination of the psychiatrist. *People v. Pacheco*, 180 Colo. 39, 502 P.2d 70 (1972).

Prosecutor must ask impeachment questions in good faith. The prosecutor may in cross-examination ask the witness if he has been convicted of a felony, but he must ask the question in good faith. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973); *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Judge to determine good faith. When prosecutors are about to impeach witnesses by reason of former felonies, they should advise the judge on what background they will propound questions, and the judge must determine, within his discretion, whether good faith is present. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973); *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Where defendant denies prior felony convictions, counsel to make offer of proof. The only way that counsel can establish good faith in asking questions about prior felonies if the defendant denies any prior felony convictions is to make an offer of proof to the court. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Proof not necessary where defendant admits prior convictions. When a defendant exercises his statutory privilege of testifying, all prior felony convictions and their nature may be shown to impeach his testimony, and where a defendant admits any prior convictions, proof thereof is not necessary. *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972).

Felony inquiry reversible error where prosecution knows there are no prior convictions. Asking the defendant, who has taken the stand in his own defense, whether he has ever been arrested for a felony when the district attorney knows that there is no prior felony conviction is reversible error. *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973).

Use of void prior convictions need not require reversal. The error implicit in the use of void prior convictions for impeachment purposes need not necessarily require reversal, particularly where the error is found to be harmless beyond a reasonable doubt. *People v. Neal*, 187 Colo. 12, 528 P.2d 220 (1974).

Limiting instruction required. When prior felony convictions are elicited during defendant's testimony, a limiting instruction is required. *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

Drug abuse by witness excluded. Where testimony concerning alleged drug abuse by the witness was irrelevant, the trial court does not abuse its discretion in refusing to allow the questioning. *People v. St. John*, 668 P.2d 988 (Colo. App. 1983).

Generally, witness cannot be impeached by acts of "bad character". Generally, impeachment of a witness' character is confined to showing former convictions of a felony, but not acts or occurrences which show "bad character". *People v. Barker*, 189 Colo. 148, 538 P.2d 109 (1975).

It is improper to impeach a witness with convictions short of felonies, but absent a contemporaneous objection, this error is not reversible. *People v. Ciari*, 189 Colo. 325, 540 P.2d 1094 (1975).

Impeachment of witnesses with questions concerning arrests is generally prohibited. *People v. Ciari*, 189 Colo. 325, 540 P.2d 1094 (1975); *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Evidence of witness's plea agreements in prior, unrelated cases was properly excluded. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Questions on arrests allowed on recross where arrest record put in evidence. Where on redirect examination, an attempt is made to restore a witness' credibility, and the defense counsel asks the witness if he has been in any further trouble since a misdemeanor conviction, and the witness responds that he has been in jail a few times, but that he had been mistakenly arrested for aggravated assault, the prosecutor on recross-examination is properly permitted to explore the arrest record of the witness. *People v. Ciari*, 189 Colo. 325, 540 P.2d 1094 (1975).

Where hostility of witness not shown, restricted examination allowed. The court does not err in restricting examination of a police detective whom the defendant calls as his own witness, on the basis that the officer is a hostile witness, where no foundation is shown that the officer is in fact a hostile witness. *People v. York*, 189 Colo. 16, 537 P.2d 294 (1975).

Witness giving a character opinion is not required to have long-term acquaintance with witness to be impeached. *Honey v. People*, 713 P.2d 1300 (Colo. 1986).

Testimony which referred to a specific occasion of truthfulness and which did not express an opinion as to character may not be admitted under this rule. *People v. Koon*, 713 P.2d 410 (Colo. App. 1985); *People v. Ross*, 745 P.2d 277 (Colo. App. 1987).

Such testimony constitutes reversible error and requires a new trial. *People v. Oliver*, 745 P.2d 222 (Colo. 1987).

Evidence of prior misdemeanor convictions involving false statements to police held admissible for impeachment purposes where

focus was on the specific instances of lying, not on the convictions themselves, and jury was instructed to consider the evidence only for the limited purpose of evaluating defendant's credibility. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Evidence of misdemeanor shoplifting is not admissible under section (b). Although shoplifting involves a form of dishonesty, a disregard of property rights of others is not probative of a propensity to be truthful or untruthful. *People v. Jones*, 971 P.2d 243 (Colo. App. 1998), overruled in *People v. Segovia*, 196 P.3d 1126 (Colo. 2008).

Shoplifting is a specific instance of conduct that is probative of truthfulness pursuant to section (b). *People v. Segovia*, 196 P.3d 1126 (Colo. 2008) (overruling *People v. Jones*, 971 P.2d 243 (Colo. App. 1998)).

Because theft generally is not probative of character for truthfulness, exclusion of evidence of theft by prosecution witness did not constitute abuse of discretion by trial court. *People v. Knight*, 167 P.3d 141 (Colo. App. 2006).

Trial court did not abuse its discretion by excluding statements related to a 10-year-old felony shoplifting incident. Because of the remoteness of the incident and its dissimilarity with the case at hand, admission of the evidence would have caused undue delay, waste of time, and confusion and was properly excluded under C.R.E. 403. *People v. Williams*, 89 P.3d 492 (Colo. App. 2003).

Rape trauma syndrome evidence generally inadmissible to determine whether an adult woman was in fact raped. However, in cases involving child incest victims, upon proper foundation, evidence of incest victim psychology may be admitted. *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986); *People v. Lucero*, 724 P.2d 1374 (Colo. App. 1986).

Expert's evaluation of victim inadmissible. Where the credibility of a child victim for truth and veracity has not been attacked, the admission of the testimony of a clinical psychologist, who has been appointed by the court for a competency evaluation of the victim, is error. *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

Where the credibility of a child victim for truth and veracity has not been attacked, the admission of the testimony of a social worker as to the truth and veracity of child victims in general is prejudicial error. *People v. Snook*, 729 P.2d 1026 (Colo. App. 1986), *aff'd*, 745 P.2d 647 (Colo. 1987).

Pediatrician's statement concerning believability of child-victim statements violated this rule but was harmless error. *People v. Gaffney*, 769 P.2d 1081 (Colo. 1989).

Social worker's lay statement concerning sincerity of child-victim's statements violated

this rule because the statement constituted impermissible character testimony. However, admission of statement was not plain error. *People v. Eppens*, 979 P.2d 14 (Colo. 1999).

Admission of the social worker's statement was not error where the child-victim herself testified and was vigorously cross-examined, the social worker testified as a lay witness, and the statement was corroborated by the testimony of the child-victim's examining physician. *People v. Eppens*, 979 P.2d 14 (Colo. 1999).

Testimony by police officer that witnesses seemed sincere was improper. *People v. Hall*, 107 P.3d 1073 (Colo. App. 2004).

Admission of investigating officer's testimony that victims were credible so undermined the fundamental fairness of the trial that serious doubt existed as to the reliability of the judgment of conviction, especially where there was an insufficient quantum and quality of other evidence and independent corroborating evidence of guilt. *People v. Cook*, 197 P.3d 269 (Colo. App. 2008).

Evidence referencing victim's credibility is admissible when describing a technique used to interrogate a suspect and to explain the context in which a suspect's statements are made. *People v. Lopez*, 129 P.3d 1061 (Colo. App. 2005).

Admission of statements by witnesses commenting on other witnesses' veracity not error where comments were elicited to explain police officers' investigative techniques and to rebut defense arguments. *People v. Davis*, ___ P.3d ___ (Colo. App. 2010).

Where defendant attacks victim's credibility, testimony regarding victim's truthfulness is admissible. *People v. Exline*, 775 P.2d 48 (Colo. App. 1988), 985 F.2d 487 (10th Cir. 1993).

Questioning of a defendant's credibility while on the witness stand does not necessarily constitute an attack on that defendant's character for truthfulness for purposes of introducing character evidence under the rule. Whether a witness's character is attacked will always depend on the circumstances of a particular case. *People v. Miller*, 890 P.2d 84 (Colo. 1995).

The mere contradiction of the testimony of the defendant by another witness does not constitute an attack on the character of the defendant such that the defendant may introduce opinion evidence as to his truthful character. *People v. Wheatley*, 805 P.2d 1148 (Colo. App. 1990).

Questions of witnesses whether they took seriously their oath to testify truthfully and if they were telling the truth, where such witnesses were not asked if other witnesses or parties were telling the truth, although of limited probative value, does not constitute improper bolstering and do not constitute plain

error. *People v. Lee*, 989 P.2d 777 (Colo. App. 1999).

Trial court erred in admitting into evidence the opinion of a social services intake worker that a child was being truthful in reporting the alleged sexual assault by the defendant on the occasion in question. *People v. Eppens*, 948 P.2d 20 (Colo. App. 1997), rev'd on other grounds, 979 P.2d 14 (Colo. 1999).

No abuse of discretion or violation of defendant's confrontation right in trial court's decision to limit cross-examination. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

Judge who presided over earlier proceedings may testify in rebuttal as to defendant's truthfulness. Where defendant testified to events leading to his arrest for taking children in violation of court order, the judge who presided over divorce could testify as rebuttal witness as to character of defendant for truthfulness. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Unproven accusations, by themselves, do not raise an inference of improper actions. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Opinion and reputation evidence of character is admissible as long as the evidence refers only to character for truthfulness or untruthfulness and that element of witness' character has been attacked. *People v. Woertman*, 786 P.2d 443 (Colo. App. 1989); *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

A stipulation concerning allegations of unprofessional conduct of a physician does not constitute a finding of misconduct by the medical board. Therefore, court did not abuse its discretion in limiting cross-examination of doctor who conducted competency evaluation of criminal defendant. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Evidence of witness' general character was properly disallowed where the evidence was not limited to the witness' truthfulness and veracity. *Wilkerson v. State*, 830 P.2d 1121 (Colo. App. 1992).

The advisement by the trial court of the defendant's right to testify was inadequate when the court failed to inform defendant that the decision to testify was personal to the defendant and failed to advise defendant as to the limited evidentiary use of any admission by the defendant. *People v. Chavez*, 832 P.2d 1026 (Colo. App. 1991), aff'd, 853 P.2d 1149 (Colo. 1993).

Opinion testimony regarding a witness' truthfulness on a specific occasion rather than to the witness' general character for truthfulness is inadmissible. *People v. Ayala*, 919 P.2d 830 (Colo. App. 1995).

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial,

argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. *Liggett v. People*, 135 P.3d 725 (Colo. 2006).

Trial court properly precluded cross-examination on crime of bigamy to impeach a witness' credibility in a criminal eavesdropping prosecution. The court determined that even if bigamy were an offense relating to truthfulness, the witness had been neither convicted, arrested, nor charged with such offense, and there was no evidence of an agreement by the prosecution not to file such charges against the

witness in exchange for his testimony. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Even if it were in the trial court's discretion to permit questioning of the witness as to the act of bigamy, it was also within the court's discretion to exclude the questioning as being more prejudicial than probative. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Applied in *People v. Sasson*, 628 P.2d 120 (Colo. App. 1980); *People v. Walker*, 666 P.2d 113 (Colo. 1983); *People v. Manners*, 713 P.2d 1348 (Colo. App. 1985); *Tevlin v. People*, 715 P.2d 338 (Colo. 1986); *People v. Jensen*, 747 P.2d 1247 (Colo. 1987).

Rule 609. (No Colorado Rule Codified)

COMMITTEE COMMENT

See § 13-90-101, C.R.S.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purposes of showing that by reason of their nature his credibility is impaired or enhanced.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Impeachment", see 22 Colo. Law. 1207 (1993). For article, "Witness Competence and Credibility: The Relevance of Religious Beliefs", see 26 Colo. Law. 121 (June 1997).

When evidence of beliefs admissible. Where evidence of witnesses' religious beliefs is relevant to the determination of questions other than impeaching or enhancing credibility, including the plaintiffs' standing to sue, the personal knowledge of certain witnesses as to religious practices about which they testified, and the basis for witnesses' opinions that the effect of a nativity scene was to prefer the Christian religion, questioning the witnesses about their religious beliefs is not objectionable under this rule. *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982).

This section was not violated in felony child abuse case where defendant raised religious

healing as an affirmative defense and was cross-examined as to his religious beliefs. The examination was probative of something other than the veracity of such witness and the court properly instructed the jury to consider the defendant's testimony only for such limited purpose. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

This rule and § 13-90-110 do not apply to statements made by a prosecutor in closing argument. A prosecutor is not a witness, and his or her statements made in closing argument are not evidence. *People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005).

Applied in *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999).

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The

court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Common Evidentiary Mistakes", see 18 Colo. Law. 1129 (1989). For article, "Impeachment", see 22 Colo. Law. 1207 (1993).

Court may limit right to cross-examination. The constitutional right to confront and cross-examine witnesses is tempered by the trial court's authority to prohibit cross-examination on matters wholly irrelevant and immaterial to issues at trial. *People v. Loscutoff*, 661 P.2d 274 (Colo. 1983); *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984); *People v. McKeehan*, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988).

Trial judge has discretion to determine the scope and the limit of cross-examination. *People v. Homan*, 185 Colo. 56, 521 P.2d 1262 (1974); *People v. Fresquez*, 186 Colo. 146, 526 P.2d 146 (1974).

Limits of cross-examination of a witness concerning general credibility is within the sound discretion of the trial court. *People v. Evans*, 630 P.2d 94 (Colo. App. 1981).

Absent abuse, judge's rulings not disturbed on review. The scope and limits of cross-examination are determined by the trial judge, and absent an abuse of discretion his rulings will not be disturbed on review. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972); *People v. Lucero*, 677 P.2d 370 (Colo. App. 1983), cert. dismissed, 706 P.2d 1283 (Colo. 1985).

In the absence of an abuse of discretion in ruling on the scope of cross-examination, a trial judge's ruling will not be disturbed on review. *People v. Homan*, 185 Colo. 56, 521 P.2d 1262 (1974); *People v. Fresquez*, 186 Colo. 146, 526 P.2d 146 (1974).

The scope and limits of cross-examination are within the sound discretion of the trial court and absent an abuse of that discretion, the rulings of the court will not be disturbed on review. *People v. Raffaelli*, 647 P.2d 230 (Colo. 1982); *Jackson v. Harsco Corp.*, 653 P.2d 407 (Colo. App. 1982).

Although the scope of the cross-examination is within the trial court's discretion, its decision will be reversed on appeal if that discretion is

abused. *People v. Diaz*, 644 P.2d 71 (Colo. App. 1981).

Cross-examination into witnesses' motives. Cross-examination should be liberally extended to permit a thorough inquiry into the motives of witnesses. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

Any evidence tending to show bias or prejudice, or to throw light upon the inclinations of witnesses, should be permitted on cross-examination. *People v. Peterson*, 633 P.2d 1088 (Colo. App. 1981).

Whether leading questions are permissible is a question within the trial court's discretion. *Bruce Hughes, Inc. v. Ingels & Assocs.*, 653 P.2d 88 (Colo. App. 1982); *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Section (c) enlarges class of adverse witnesses. The purpose of section (c) is to enlarge that class of witnesses recognized as adverse, or identified with a party adverse, to one of the parties. This intent is demonstrated by the elimination of specific classes of adverse parties, including officers, directors, or managing agents of a public or private corporation, from section (c). *Bruce Hughes, Inc. v. Ingels & Assocs.*, 653 P.2d 88 (Colo. App. 1982).

If a witness may be characterized as adverse under the more stringent C.R.C.P. 43(b), it follows that section (c) of this rule would most certainly include him as either an adverse party or a witness identified with an adverse party. *Bruce Hughes, Inc. v. Ingels & Assocs.*, 653 P.2d 88 (Colo. App. 1982).

Trial court has discretion to limit cross-examination without probative force. While adhering to the general rule that a defendant should be allowed wide latitude to cross-examine a prosecution witness for the purpose of showing bias or undue interest, the trial court has some discretion in limiting such cross-examination where it is without probative force. *People v. Simmons*, 182 Colo. 350, 513 P.2d 193 (1973).

Court did not deny defendant due process by requiring defendant to testify on the first day of trial. The order of proof at trial is a matter within the court's discretion. Court required defendant to testify in order to make use of jury's time. Defendant had previously expressed his intent to testify, and court permitted defendant to testify again, following the testimony of his

expert witness. *People v. Walden*, 224 P.3d 369 (Colo. App. 2009).

The court may terminate cross-examination altogether, if it is clear further testimony would not advance the truth-seeking function of the trial. When defense counsel continued baseless cross-examination, termination of cross-examination was warranted where the court believed defense counsel had no further line of inquiry. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

Recross-examination may embrace those matters testified to on redirect examination. *People v. Ciari*, 189 Colo. 325, 540 P.2d 1094 (1975).

Whether to allow late indorsement of witness is within discretion of trial court, and absent an abuse of such discretion, the ruling will not be disturbed on review. *People v. MacFarland*, 189 Colo. 363, 540 P.2d 1073 (1975).

No reversible error where trial court permitted prosecutor to ask leading questions on redirect to develop and clarify witness's testimony. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Section (b) does not limit cross-examination to the same acts and facts to which a witness has testified on direct examination. The rule must be liberally construed to permit cross-examination on any matter germane to the direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict, or rebut testimony given by the witness. *People v. Sallis*, 857 P.2d 572 (Colo. App. 1993); *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

Section (b) should be liberally construed to permit cross-examination on any matter germane to the direct examination. *People v. Marion*, 941 P.2d 287 (Colo. App. 1996).

If a defendant makes a general denial of the offense charged or as to a matter of ultimate fact, the prosecutor is not limited to a mere categorical review of the evidence testi-

fied to on direct examination. The prosecutor must be permitted to examine the defendant in detail as to matters directly referred to during direct examination. *People v. Sallis*, 857 P.2d 572 (Colo. App. 1993).

Trial court erred in denying cross-examination of a wife as to the fraudulent nature of her spouse's personal injury claim against his employer where the wife testified during direct examination only as to the effect of the spouse's injuries on his family. The scope of cross-examination includes the subject matter of direct examination and matters affecting witness credibility. Admissions by the wife's spouse was related directly to the wife's direct testimony concerning the spouse's injuries. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

No reversible error where administrative hearing officer permitted testimony on cross examination as to whether petitioner believed that complaining witness was telling the truth where petitioner did not object and record did not reflect that such testimony affected the result of hearing. *Knowles v. Bd. of Educ.*, 857 P.2d 553 (Colo. App. 1993).

Trial court may not place excessive limitations on defendant's cross-examination of witness especially regarding bias, prejudice, or motive for testifying. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993).

Trial court neither abused its discretion nor violated defendant's right to confrontation where defendant was prohibited from revealing to jury through cross-examination that witness was in custody in another state on unrelated charges where such testimony would have been cumulative and of little or no probative value and where defendant was otherwise provided with ample opportunity to impeach the witness's credibility by showing ulterior motive. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993).

Applied in *Danburg v. Realities, Inc.*, 677 P.2d 439 (Colo. App. 1984); *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999).

Rule 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh his memory for the purpose of testifying, either —

- (1) while testifying, or
- (2) before testifying, if

the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in

criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

ANNOTATION

Law reviews. For article, "A Deposition Primer, Part II: At the Deposition", see 11 Colo. Law. 1215 (1982). For article, "Rule 612 Revisited", see 11 Colo. Law. 1553 (1982). For article, "Waiver of Privilege Under Rule 612", see 24 Colo. Law. 2563 (1995). For article, "Rule 612: Discovery of Documents Shown to a Witness Before Deposition", see 37 Colo. Law. 41 (June 2008).

Error to admit report not used or referred to by witness. Where no part of a report is used or referred to by a witness in his direct testimony, the admission of the report in the course of cross-examination on the theory that the witness has used the report to refresh his memory before testifying is error. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

Rule 613. Prior Statements of Witnesses

(a) **Examining witness concerning prior inconsistent statements for impeachment purposes.** Before a witness may be examined for impeachment by prior inconsistent statement the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As a part of that foundation, the examiner may refer to the witness statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given.

Where the witness denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible.

Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made.

COMMITTEE COMMENT

Concerning prior statements of witnesses, the Colorado Rule of Evidence as it now exists is set forth in Transamerica Insurance Co. v.

Pueblo Gas & Fuel Co., 33 Colo. App. 92, 95, 519 P.2d 1201, 1203 (1973).

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Prior Inconsistent Statements", see 17 Colo. Law. 1977 (1988). For article, "Rules 801 and 613: Evidentiary Uses of Pleadings Filed in Other Cases", see 21 Colo. Law. 2389 (1992).

Comparing this rule to § 16-10-201, it is clear that this rule is directed to situations in which a prior inconsistent statement is used for impeachment purposes only, but § 16-10-201 eliminates the hearsay impediment to using prior inconsistent statements for proving the truth of matters asserted so long as statutory foundation requirements for admissibility of the evidence have been satisfied. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

No need to prove admitted contradictory statements. Where an attempt is made to impeach a witness through a prior statement and the witness admits having made the contradictory statement in question, there is no necessity for proving it, and the statement itself is inadmissible. *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971).

When prosecution asks impeachment questions that imply witness has changed his story, but does not offer extrinsic evidence to prove the making of those statements, admission of that questioning is not plain error. This rule allows the prosecution to offer extrinsic evidence to prove the disputed point, but does not require it. *People v. Sandoval-Candelaria*, __ P.3d __ (Colo. App. 2011).

Witness may be impeached without prior

interrogation where witness contradicted by inconsistent actions. The rule that a witness cannot be impeached by showing he has made statements at another time inconsistent with his testimony without a foundation being laid by interrogating the witness does not apply where the attempt to contradict the witness merely consists of showing acts and circumstances inconsistent with his testimony. *People v. Hutto*, 181 Colo. 279, 509 P.2d 298 (1973).

Prosecution may use another portion of same testimony used by defense to impeach. Where the defense counsel tries to impeach on only a portion of prior testimony in an attempt to show an inconsistency or contradiction, he waives any objection to the prosecution's using another portion of the same testimony in order to show that in its totality the testimony was not actually inconsistent. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975).

Deposition used for impeachment purposes is always admissible under rules of evidence to discredit witness, even if opposing party was not represented at deposition, if it is relevant, material, and not collateral. *Appel v. Sentry Life Ins. Co.*, 739 P.2d 1380 (Colo. 1987).

Although this rule was an inappropriate vehicle for admission of prior inconsistent statement, evidence held properly admissible under § 16-10-201, and defendant's conviction would not be overturned. *People v. Jenkins*, 768 P.2d 727 (Colo. App. 1988).

The court need not determine that the prior inconsistent statement was voluntary before permitting counsel to cross-examine a witness concerning the prior statement. *People v. Ball*, 821 P.2d 905 (Colo. App. 1991).

A specific exception to the foundational requirements of CRE 613 is created by CRE 806. Thus, where a transcript of a witness' testimony at the first trial was admitted into evidence at the second trial, testimony of a police detective as to inconsistent statements made by the witness were admissible without the witness first having opportunity to explain the prior inconsistent statements. *People v. Ball*, 821 P.2d 905 (Colo. App. 1991).

Applied in *City of Gunnison v. McCabe Hereford Ranch*, 702 P.2d 768 (Colo. App. 1985).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) **Calling by court.** The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.

(c) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(Federal Rule Identical.)

ANNOTATION

Court's prerogative and duty to question witnesses. A trial court has the prerogative and, sometimes, the duty to question witnesses called by a party. *People v. Ray*, 640 P.2d 262 (Colo. App. 1981).

The trial court may interrogate witnesses, regardless of which party has produced them. It is sometimes the court's duty to question witnesses to develop the truth more fully and to clarify testimony. *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986).

Questions by court are not improper where purpose is to more fully develop truth

and to clarify testimony already given. *People v. Ray*, 640 P.2d 262 (Colo. App. 1981).

Test to be applied when court interrogates witnesses is whether the trial court's conduct so departed from the required impartiality as to deny the defendant a fair trial. *People v. Ray*, 640 P.2d 262 (Colo. App. 1981); *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986); *Sanchez v. Lauffenburger*, 784 P.2d 855 (Colo. App. 1989).

Applied in *People in Interest of Archuleta*, 653 P.2d 93 (Colo. App. 1982).

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its

attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "Rule 615: Exclusion of Witnesses", see 24 Colo. Law. 1299 (1995).

Policy reasons for sequestration rule are to prevent a witness from conforming his testimony to that of another and to discourage fabrication and collusion. *Martin v. Porak*, 638 P.2d 853 (Colo. App. 1981).

Purpose of rule is accomplished under rule's terms by ordering witnesses to withdraw from courtroom until called; however, to make rule effective, court may also direct witnesses not to discuss case with each other. *People v. Brinson*, 739 P.2d 897 (Colo. App. 1987).

This rule applies only to witnesses, not attorneys. Thus, an attorney's discussion of one witness's testimony with a prospective witness does not violate the rule. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

A court has discretion, in appropriate circumstances, to grant an exception allowing a witness to impeach the testimony of a criminal defendant after hearing the defendant's testimony. Trial court properly granted exception to sequestration order by allowing prosecution's toxicologist to hear defendant's testimony and testify in response thereto. *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

For the purposes of determining who may be excluded from a pretrial deposition, CRCP 26 (c)(5) and not this rule controls. *Hamon Contractors, Inc. v. District Court*, 877 P.2d 884 (Colo. 1994).

When denial of sequestration mandates new trial. A trial court's error in denying a sequestration request does not mandate a new trial unless the requesting litigant demonstrates that the error constitutes sufficient prejudice to amount to an abuse of discretion. *Martin v. Porak*, 638 P.2d 853 (Colo. App. 1981); *Williamson v. Sch.* District No. 2, 695 P.2d 1173 (Colo. App. 1984).

Corporation's officers allowed to remain in courtroom. Although witnesses who are officers of a party-corporation are not formally designated as representatives, the trial court may still allow the witnesses to remain in the courtroom. *Jefferson-Western Corp. v. Chefas*, 670 P.2d 431 (Colo. App. 1983).

Rule prohibits the sequestration of an officer or employee of a nonnatural party who has been duly designated as its representative. *People v. Cheeks*, 682 P.2d 484 (Colo. 1984).

Determination of whether there has been a violation of a sequestration order and the penalty or sanction to be imposed are all matters resting within the discretion of the court. *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

Where trial court simply ordered district attorney to tell his witnesses not to talk to each other about their testimony, the sequestration order had not been violated when prosecutor talked to his witnesses in a group prior to presentation of any evidence. *People v. Brinson*, 739 P.2d 897 (Colo. App. 1987).

It is in the trial court's discretion to determine the appropriate penalty for a violation of a sequestration order. *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

In determining whether to impose sanctions for violation of sequestration order, court must consider three things: (1) The involvement, or lack thereof, of a party or his counsel in the violation of the order; (2) the witness' actions and state of mind in his violation of the order and whether the violation was inadvertent or deliberate; and (3) the subject matter of the violation in conjunction with the substance of the disobedient witness' testimony. *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

Test applied in *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003), aff'd on other grounds, 102 P.3d 315 (Colo. 2004).

The supreme court modified the first factor set forth above to require evidence of the party's or counsel's consent, connivance, procurement, or knowledge regarding the violation before a sanction can be imposed against that party. *People v. Melendez*, 102 P.3d 315 (Colo. 2004).

In determining whether to impose sanctions for violation of a sequestration order, the trial court must consider, in addition to other things, the subject matter of the violation in conjunction with the substance of the testimony of the disobedient witness. Also, in order to prevail, the defendant must show that the witness' testimony would have been different but for the conversation which violated the court's order. *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

Sanctions for violation of a sequestration order, in addition to a mistrial, fall into three categories: (1) Citing the witness for contempt; (2) permitting comment on the witness' non-compliance in order to reflect on his credibility; or (3) refusing to let the witness testify or strik-

ing his testimony. *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

It was an abuse of discretion to impose the extreme sanction of witness exclusion without an inquiry into the factors governing the imposition of such a sanction, and, in particular, without evidence that the defense was at fault for the violation. *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003), *aff'd*, 102 P.3d 315 (Colo. 2004).

Prejudice resulting from violation of a sequestration order must be shown in order to require granting of a mistrial. *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

A victim's right to be present at all critical stages of the criminal justice process under Const. Art. II § 16a and § 24-4.1-302.5 (1)(d) takes precedence over a party's right to sequester witnesses under this rule. The father of a murder victim who testified in the defendant's trial was wrongly excluded from subsequent portions of the trial. *People v. Conney*, 98 P.3d 930 (Colo. App. 2004).

Applied in *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981).

ARTICLE VII OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Federal Rule Identical.)

Source: Entire rule amended and adopted June 20, 2002, effective July 1, 2002.

COMMITTEE COMMENT

This rule does not foreclose an owner from giving an opinion as to the value of his real

property. *Universal Insurance Company v. Arrigo*, 96 Colo. 531, 44 P.2d 1020 (1935).

ANNOTATION

Law reviews. For article, "Opinion Testimony", see 22 Colo. Law. 1185 (1993). For article, "Rule 701: Admissibility of Opinion Testimony by Lay Witnesses", see 26 Colo. Law. 63 (March 1997). For article, "Rules 701 and 702: Boundary Between Lay and Expert Opinion Testimony", see 34 Colo. Law. 53 (July 2005).

Lay testimony must be: (1) Rationally based on the perception of the witness; and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

Establishment of qualifications to express opinion is question for trial court. The sufficiency of evidence to establish the qualifications and knowledge of a witness to express an opinion based on physical facts he has observed is a question for the trial court, not subject to reversal unless clearly erroneous. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Attorney's opinion about client's mental condition admissible. The trial court errs in

refusing to permit an attorney to express his opinion, as a lay witness, on the question of whether his client suffered from an impaired mental condition at the time of his alleged commission of an offense. *People v. Rubanowitz*, 673 P.2d 45 (Colo. App. 1983).

In a first-degree sexual assault trial, testimony of counselor consisting of general comments based on her observations of victim's demeanor following alleged sexual assault was not inadmissible as amounting to a scientific diagnosis of rape trauma syndrome, as long as counselor did not use scientific terminology, discuss theory, or state an opinion as to whether she believed victim. *People v. Farley*, 712 P.2d 1116 (Colo. App. 1985), *aff'd*, 746 P.2d 956 (Colo. 1987).

Lay opinion from police officer admitted where police officer testified he had been involved in law enforcement for fourteen years, had experience investigating burglaries of parking lot money depositories, and was familiar with the tools similar to those allegedly used in burglary of money depository. *People v. Garcia*, 784 P.2d 823 (Colo. App. 1989).

Police officer may offer lay testimony if based on his or her perceptions and experiences but does not require specialized training or education. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

Lay opinion from detective stating he recognized defendant on a surveillance videotape was admissible, regardless of the fact that defendant's appearance had not changed and the jury was allowed to view the videotape. The court held the detective's testimony was rationally based on his knowledge of the defendant's appearance and that, since the defendant's identity was at issue in the trial, the detective's testimony was helpful to a clear understanding of a fact at issue. *People v. Robinson*, 908 P.2d 1152 (Colo. App. 1995), *aff'd*, 927 P.2d 381 (Colo. 1996).

Lay opinion of crime scene technician admitted where the technician testified to the location of bullet holes and the paths of the bullets. The holes and paths of the bullets were evident from photographs. Technician did not perform any experiments or reconstruct the incident, therefore his testimony did not require any specialized or scientific knowledge to understand. *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001).

Allowing police officer's testimony regarding use of glass pipe and torch lighter to smoke methamphetamine not plain error. *People v. Malloy*, 178 P.3d 1283 (Colo. App. 2008).

A lay witness may testify concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to identify the defendant from the photograph than the jury is. *Robinson v. People*, 927 P.2d 381 (Colo. 1996).

Lay opinion testimony of analyst from division of insurance that petitioner's income was not misrepresented admitted when she reviewed documents already before the jury and she based her testimony on her common tax knowledge and her experience as an insurance analyst. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Lay opinion of analyst from division of insurance regarding petitioner's mental health admissible where testimony was based upon documentation analyst received as well as a personal meeting with the petitioner, and was supported by other evidence. Even if the testimony was inadmissible lay opinion, admission of testimony was cumulative, corrected by a limiting instruction, and harmless. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Lay opinion testimony is admissible to prove drug-induced intoxication. There is no basis to distinguish lay testimony regarding alcohol-induced intoxication from lay testimony regarding drug-induced intoxication, as long as

the proper foundation has been laid. *People v. Souva*, 141 P.3d 845 (Colo. App. 2005).

Lay opinion testimony of witnesses, including minors, admissible to identify the substance provided to them by defendant was marijuana. The witnesses described prior experiences with marijuana and based their identification on its appearance, taste, and distinctive smell. These matters did not require any technical or specialized knowledge that would fall within the scope of C.R.E. 702. Accordingly, the minors established a proper foundation for their identification testimony. *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

There is no requirement that chemical tests be administered or that expert testimony be offered to bolster such lay identification testimony. *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

Trial court inappropriately admitted lay testimony of investigating police officer as to experimentation with respect to and reconstruction of the incident without qualifying the officer as an expert witness. The officer's testimony involved more than common experience and required practical knowledge of a scientific, technical, or specialized nature. Admission of the testimony constitutes harmless error, however, and does not require reversal. *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

Trial court improperly admitted expert testimony of police officers concerning methamphetamine amounts, production chemicals, and manufacture under the guise of lay testimony. The testimony required specialized knowledge and training and, thus, was subject to the expert witness requirements of C.R.E. 702. *People v. Veren*, 140 P.3d 131 (Colo. App. 2005).

A person may testify as a lay witness only if his or her opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person. To determine whether an opinion is one "which could be reached by any ordinary person", courts consider whether ordinary citizens can be expected to know or to have certain experiences. In this case, although the officer had experience with photo arrays that an ordinary person would not, the officer's opinion could have been reached by an ordinary person. *People v. Rincon*, 140 P.3d 976 (Colo. App. 2005).

Court abused its discretion in admitting some lay opinions from mental health providers who had not been properly noticed as experts by the prosecution. Some of the opinions were expert opinions improperly admitted under the guise of lay opinion testimony. The improper testimony related to symptoms of specific mental illness and opinions about whether defendant suffered from mental illness. The evidence relied upon the witness' specialized knowledge and training and, therefore, went

beyond the bounds of lay opinion. The error in this case was harmless since there was ample evidence in addition to the improperly admitted opinions. *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Lay opinion from alleged murder victim's coworker who heard abusive statements made by defendant to victim found admissible and the coworker could make characterization of such statements as a part of the testimony. *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991).

Admission of the opinion testimony of lay witnesses on the issue of causation does not constitute reversible error. *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992).

Forensic interviewer's testimony properly admitted. Testimony was not expert opinion evidence but rather an opinion based on observation. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), aff'd on other grounds sub nom. *People v. Simon*, 266 P.3d 1099 (Colo. 2011); *People v. Marsh*, __ P.3d __ (Colo. App. 2011).

Lay witness may offer opinion testimony on intent of victim if witness had sufficient opportunity to observe the person and draw a rational conclusion about the person's state of mind. *People v. Jones*, 907 P.2d 667 (Colo. App. 1995).

The trial court did not abuse its discretion in allowing a counselor from the detoxification

facility at which the defendant allegedly committed a sexual assault to state an opinion as to whether the sexual encounter was consensual, since the testimony was based on the counselor's own observations. The trial court appropriately allowed the counselor to testify as to whether the victim was in an unconscious state at the time of the assault and to testify as to whether the defendant's actions constituted a sexual assault. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

Where the witness was not qualified as an expert and the witness had no personal experience with the maintenance expenses on the property, evidence presented as to the amount of future maintenance expenses was legally insufficient. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993).

Applied in *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984); *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986); *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Brown*, 731 P.2d 763 (Colo. App. 1986); *Sandoval v. Birx*, 767 P.2d 759 (Colo. App. 1988); *Pyles-Knutzen v. Bd. of County Comm'rs*, 781 P.2d 164 (Colo. App. 1989); *Graham v. Lombardi*, 784 P.2d 813 (Colo. App. 1989); *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001).

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ANNOTATION

Law reviews. For article, "Selecting an Expert Witness", see 12 Colo. Law. 1464 (1983). For review, "Admissibility of Thermography: Objective Evidence or a Mystical Procedure", see 65 Den. U. L. Rev. 295 (1988). For article, "Hearsay as a Basis for Opinion Testimony", see 17 Colo. Law. 2337 (1988). For article, "DNA: The Eyewitness of the Future", see 18 Colo. Law. 1333 (1989). For article, "Rule 702: Admissibility of Expert Testimony Regarding Eyewitness Identification", see 21 Colo. Law. 927 (1992). For article, "Introduction of Scientific Evidence in Criminal Cases", see 22 Colo. Law. 273 (1993). For article, "Opinion Testimony", see 22 Colo. Law. 1185 (1993). For article, "The Misuse and Abuse of Psychological Experts in Court", see 23 Colo. Law. 2757 (1994). For article, "Evaluating Recovered Memories of Trauma as Evidence", see 25 Colo. Law. 1 (January 1996). For article, "Rule 702: Admissibility of Expert Testimony", see

30 Colo. Law. 55 (November 2001). For article, "Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704", see 31 Colo. Law. 53 (March 2002). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002). For article, "Polygraph Examinations: Admissibility and Privilege Issues", see 31 Colo. Law. 69 (November 2002). For article, "Challenging the Unreliable Damages Expert—Part I", see 32 Colo. Law. 119 (October 2003). For article, "Challenging the Unreliable Damages Expert—Part II", see 32 Colo. Law. 103 (November 2003). For article, "Colorado's Certificate of Review Statute: Considerations in Professional Negligence Cases", see 33 Colo. Law. 11 (February 2004). For article, "The Admissibility of Expert 'Profile Evidence'", see 33 Colo. Law. 53 (March 2004). For article, "Rules 701 and 702: Boundary Between Lay and Expert Opinion Testimony", see 34 Colo. Law. 53 (July

2005). For article, "Using Experts to Aid Jurors in Assessing Child Witness Credibility", see 35 Colo. Law. 65 (August 2006).

This rule governs a trial court's determination regarding the admissibility of expert testimony. When proposed expert testimony involves experience-based specialized knowledge, the court must consider whether the testimony will be helpful to the jury and whether the witness is qualified to render an expert opinion on the subject in question. *Meier v. McCoy*, 119 P.3d 519 (Colo. App. 2004).

Determination of expert within court's discretion. The trial court has wide discretion in determining whether the requirements to qualify a witness as an expert are met. *Connell v. Sun Exploration & Prod. Co.*, 655 P.2d 426 (Colo. App. 1982).

Matter of the qualification of expert witness is discretionary with the trial court. *White v. People*, 175 Colo. 119, 486 P.2d 4 (1971); *People v. Tidwell*, 706 P.2d 438 (Colo. App. 1985); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986); *People v. Williams*, 790 P.2d 796 (Colo. 1990).

The court should consider the expert's experience of the time of trial, not on the date of the alleged malpractice. *Durkee v. Oliver*, 714 P.2d 1330 (Colo. App. 1986); *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

The trial court determines the qualification of witnesses and has discretion to admit expert witness testimony. *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986).

The qualification of an expert is a matter within the sound discretion of the trial judge. *People v. Chavez*, 182 Colo. 216, 511 P.2d 883 (1973); *People v. Lomanaco*, 802 P.2d 1143 (Colo. App. 1990).

The qualification of expert witness to competently testify on a matter of opinion is one of judicial discretion. *People v. DeLuna*, 183 Colo. 163, 515 P.2d 459 (1973).

The qualification of an expert witness to testify is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *Meier v. McCoy*, 119 P.3d 519 (Colo. App. 2004).

The competency of an expert is for the trial court to determine. *People v. Anderson*, 184 Colo. 32, 518 P.2d 828 (1974).

Whether opinion testimony is within a witness' expertise generally is a matter addressed to the sound discretion of the court. *People v. Gomez*, 632 P.2d 586 (Colo. 1981).

Trial court has broad discretion to determine the admissibility of expert testimony pursuant to this section. *People v. Fasy*, 820 P.2d 1314 (Colo. 1992).

Trial court has discretion in determining the qualifications of an expert and the admissibility of expert evidence, and the court's ruling will not be disturbed absent an abuse of discre-

tion. *Baird v. Power Rental Equip., Inc.*, 191 Colo. 319, 552 P.2d 494 (1976); *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43 (Colo. App. 1997).

Court's decision not disturbed absent abuse. A court's decision to allow a witness to testify as an expert will not be disturbed without a clear showing of an abuse of discretion. *White v. People*, 175 Colo. 119, 486 P.2d 4 (1971); *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972); *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972); *People v. Drumright*, 181 Colo. 137, 507 P.2d 1097 (1973); *People v. Anderson*, 184 Colo. 32, 518 P.2d 828 (1974); *Bd. of Comm'rs v. Fixed Base Operators*, 939 P.2d 464 (Colo. App. 1997); *People v. Bornman*, 953 P.2d 952 (Colo. App. 1997).

The sufficiency of foundation evidence to establish qualifications and knowledge of a witness to entitle him to express an opinion is a question for the trial court's determination, and in the absence of a showing of abuse of discretion this determination will not be overturned. *People v. Jiminez*, 187 Colo. 97, 528 P.2d 913 (1974).

The discretion of the trial judge over the scope of expert testimony will not be disturbed on review absent a clear showing of abuse. *People v. Davis*, 187 Colo. 16, 528 P.2d 251 (1974); *People v. Jensen*, 747 P.2d 1247 (Colo. 1987).

The determination of whether a witness is qualified to render an expert opinion is committed to the discretion of the trial court, and will not be disturbed on review unless that discretion is abused. *People v. District Court*, 647 P.2d 1206 (Colo. 1982).

The trial court has discretion to rule upon the qualifications of expert witnesses and unless that discretion is abused its decision will not be disturbed on appeal. *Stone v. Caroselli*, 653 P.2d 754 (Colo. App. 1982).

Trial court not required to make specific finding that witness is qualified as an expert. *People v. Lomanaco*, 802 P.2d 1143 (Colo. App. 1990).

Disqualification of experts based on a conflict of interest is governed by a two-part test. First, whether it was objectively reasonable for the party to conclude that a confidential relationship existed with an expert consultant. Second, whether any confidential or privileged information was disclosed by that party to the expert consultant. In re *Page*, 70 P.3d 579 (Colo. App. 2003).

A confidential relationship may arise if: (1) One party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice; (2) one party has gained the confidence of the other and purports to act or advise with the other's interest in mind; or (3) the parties' relationship is such that one is induced to relax the care and vigilance that

ordinarily would be exercised in dealing with a stranger. In re Page, 70 P.3d 579 (Colo. App. 2003).

Rule does not require previous qualification as an expert or that the proposed expert belong to any particular organization. White v. People, 175 Colo. 119, 486 P.2d 4 (1971); People v. Bornman, 953 P.2d 952 (Colo. App. 1997).

Trial court inappropriately admitted lay testimony of investigating police officer as to experimentation with respect to and reconstruction of the incident without qualifying the officer as an expert witness. The officer's testimony involved more than common experience and required practical knowledge of a scientific, technical, or specialized nature. Admission of the testimony constitutes harmless error, however, and does not require reversal. People v. Stewart, 55 P.3d 107 (Colo. 2002).

Trial court improperly admitted expert testimony of police officers concerning methamphetamine amounts, production chemicals, and manufacture under the guise of lay testimony. The testimony required specialized knowledge and training and, thus, was subject to the expert witness requirements of this rule. People v. Veren, 140 P.3d 131 (Colo. App. 2005).

Trial courts possess broad discretion to allow or prohibit testimony by expert witnesses in criminal cases and an exercise of that discretion will not be overturned absent a showing of manifest error. People v. Lanari, 926 P.2d 116 (Colo. App. 1996).

Trial court properly concluded that a witness was not qualified to give expert testimony on the use of force by law enforcement officers effecting an arrest when the witness had never (1) been employed in a law enforcement field, (2) participated professionally in a determination of what force a police officer may use in making an arrest, (3) arrested anyone, (4) completed a police officer training course, or (5) been retained by a police department to teach use of force. Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

This rule requires a two-tiered analysis for determining the reliability and validity of the underlying substance of an expert's opinion and a trial court must balance the reliability of the scientific principles upon which the testimony rests and the likelihood that the introduction of the evidence may overwhelm or mislead the jury. Colwell v. Mentzer Inv., Inc., 973 P.2d 631 (Colo. App. 1998); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

In exercising its discretion under this rule, the court should consider numerous factors, including the nature and extent of evidence in the case, the expertise of the proposed witness, the sufficiency and extent of the foundational evidence upon which the expert witness' ultimate

opinion is to be based, and the scope and content of the opinion itself. People v. Lanari, 926 P.2d 116 (Colo. App. 1996); People v. Lesslie, 939 P.2d 443 (Colo. App. 1996); People v. Masters, 33 P.3d 1191 (Colo. App. 2001), *aff'd*, 59 P.3d 979 (Colo. 2002).

Lanari factors applied and admission of proffered expert testimony properly denied in People v. Miller, 981 P.2d 654 (Colo. App. 1998).

This rule provides a more lenient standard for the admission of opinion evidence than does the test originally developed in Frye v. United States. The rule allows the admission of scientific evidence if such evidence will assist the jury in understanding the evidence or determining a fact at issue. DNA identification testimony in sexual assault case admissible under the rule and under Frye. People v. Fishback, 829 P.2d 489 (Colo. App. 1991), *aff'd*, 851 P.2d 884 (Colo. 1993).

This rule represents the appropriate standard for determining the admissibility of scientific evidence, rather than the test developed in Frye v. United States. Under the standard established in this rule, the trial should focus on the reliability and relevance of the scientific evidence and determine the reliability of the scientific principles, the qualifications of the witness, and the usefulness of the testimony to the jury. In determining the reliability and relevance of the evidence, the court should apply a broad inquiry and consider the totality of the circumstances in each specific case, considering a wide range of factors. Because the applicable standard is so liberal, the court should also apply its discretionary authority under C.R.E. 403 to ensure the probative value of the evidence is not substantially outweighed by unfair prejudice. People v. Shreck, 22 P.3d 68 (Colo. 2001); Masters v. People, 59 P.3d 979 (Colo. 2002); People v. Rector, 248 P.3d 1196 (Colo. 2011).

Trial court has discretion to decide whether to conduct an evidentiary hearing when a party requests a Shreck analysis. A court is not required to conduct an evidentiary hearing under Shreck provided it has before it sufficient information to make specific findings under C.R.E. 403 and this rule about the reliability of the scientific principles involved, the expert's qualification to testify to such matters, the helpfulness to the jury, and potential prejudice. People v. Rector, 248 P.3d 1196 (Colo. 2011).

A party raising a challenge under Shreck to the admissibility of expert testimony must sufficiently identify the testimony or witness being challenged. People v. Rector, 248 P.3d 1196 (Colo. 2011).

"Reasonable medical probability" standard should no longer be used. This rule allows the admission of scientific expert testi-

mony when: (1) the scientific principles at issue are reasonably reliable; (2) the witness is qualified to opine on such principles; (3) the testimony is useful to the jury; and (4) the probative value of the evidence outweighs any potential prejudice. An inquiry into whether the expert expresses his or her opinion to the required degree of medical probability is not appropriate. *Estate of Ford v. Eicher*, 250 P.3d 262 (Colo. 2011).

The reliability analysis hinges on whether the scientific principles the expert employed are grounded in the methods and procedures of science. *Estate of Ford v. Eicher*, 250 P.3d 262 (Colo. 2011).

Gatekeeping function to rule out "junk science" only allows court to determine whether an alternative theory is reasonably reliable. The court abuses its discretion when it determines which of two competing medical theories of causation is the more plausible and prevents the expert from offering the other. *Estate of Ford v. Eicher*, 220 P.3d 939 (Colo. App. 2008), *aff'd*, 250 P.3d 262 (Colo. 2011).

The fact that there is no ethical way to test an alternative medical theory does not preclude the admissibility of testimony but goes to the weight that the jury may assign to it. *Estate of Ford v. Eicher*, 220 P.3d 939 (Colo. App. 2008), *aff'd*, 250 P.3d 262 (Colo. 2011).

In determining that expert's testimony is unreliable and, therefore, should not be admitted under this rule, it is not enough for a court to conclude that the testimony is "speculative". Instead, the court must consider whether the scientific principles underlying the testimony are reasonably reliable and whether the expert is qualified to opine on such matters. *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

Statement of opinion in terms indicating a lack of certainty, such as "a possible mechanism" or "a reasonable supposition", do not by themselves render the opinion speculative. *Estate of Ford v. Eicher*, 220 P.3d 939 (Colo. App. 2008), *aff'd*, 250 P.3d 262 (Colo. 2011).

Trial court did not commit manifest error when it determined that forensic psychologists' testimony related to motivation and behavior of individuals committing sexual homicides, a recognized subspecialty of forensic psychology, was reasonably reliable, that it was helpful to the jury, and that under C.R.E. 403 the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the evidence. *Masters v. People*, 59 P.3d 979 (Colo. 2002).

A trial court has the discretion to determine the admissibility of expert evidence and the trial court committed harmless error by refusing to permit an expert witness to testify on

behalf of the plaintiff. *Simon v. Truck Ins. Exch.*, 757 P.2d 1123 (Colo. App. 1988).

Admissibility of expert evidence must be evaluated in light of its offered purpose on review for potential abuse of discretion, and prosecution's proffered reason for admitting testimony to show the basis of the expert's opinion that a subdural hematoma is only caused by massive, violent force was an undisputed fact that helped the jury understand the facts of the case, and therefore was not an abuse of discretion. *People v. Martinez*, 74 P.3d 316 (Colo. 2003).

But trial court's admission of evidence of accident scenarios without a showing of a link between shaken-impact syndrome and the accident scenarios was error, as C.R.E. 702's helpfulness standard requires a valid scientific connection, enunciated to the jury. *People v. Martinez*, 74 P.3d 316 (Colo. 2003).

It was reversible error for the court to fail to apply the helpfulness standard of this rule in determining the admissibility of testimony on the reliability of eyewitness identification. *Campbell v. People*, 814 P.2d 1 (Colo. 1991).

When expert testimony unnecessary. Where the trial court is sitting as a finder of fact and is capable of drawing its own inferences from the facts in the record, it need not admit expert testimony on a matter that it is capable of resolving without such testimony. *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982).

Trial court did not abuse its discretion in admitting expert testimony where defendant did not present any evidence rebutting the reliability or general acceptance of the evidence. *Stoczynski v. Livermore*, 782 P.2d 834 (Colo. App. 1989).

The basis for admissibility under this rule is not that the witness possesses skill in a particular field but that the witness can offer assistance on a matter not within the knowledge or common experience of people of ordinary intelligence. *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. App. 1990); *Hines v. D. & R.G.W. R. Co.*, 829 P.2d 419 (Colo. App. 1991).

The fact that a witness gained specialized knowledge while working under the supervision of others does not render the witness unqualified. *Town of Red Cliff v. Reider*, 851 P.2d 282 (Colo. App. 1993).

Expert testimony by an architect not licensed in the state may be properly admitted if the trial court determines whether the individual's education, training, experience, and knowledge in the field of architecture establishes that he has special knowledge concerning the architectural standards, including statewide standards applicable to Colorado practitioners, and whether the testimony would aid the court. *Corcoran v. Sanner*, 854 P.2d 1376 (Colo. App. 1993).

Competence to testify as to medical standards. Generally, practitioners of one school of medicine are not competent to testify as experts relative to standards of care required of practitioners of another school. *Greene v. Thomas*, 662 P.2d 491 (Colo. App. 1982).

However, a physician from one specialty may testify concerning the standard of care required of a physician with a different specialty, provided that the expert witness has acquired, through experience or study, more than just a casual familiarity with the standards of care of the defendant's specialty. *Greene v. Thomas*, 662 P.2d 491 (Colo. App. 1982); *Connelly v. Kortz*, 689 P.2d 728 (Colo. App. 1984).

Where the witness and the defendant are both doctors of podiatric medicine, the testimony is admissible regardless of the difference of the practices. *Durkee v. Oliver*, 714 P.2d 1330 (Colo. App. 1986).

A physician may be qualified as an "expert in medicine" rather than a specialty so long as his or her knowledge, skill, experience, training, or education supports the qualification, and he or she is capable of providing specialized knowledge that will assist the decision-maker in determining the issues. *People ex rel. Strodman*, __ P.3d __ (Colo. App. 2011).

The test developed in *Frye v. United States* is applicable to novel scientific devices or processes involving the evaluation of physical evidence. The test contained in this rule is applicable if the evidence is of a general nature and the expert's testimony does not concern this particular victim. *Fishback v. People*, 851 P.2d 884 (Colo. 1993) (disapproved in *People v. Shreck*, 22 P.3d 68 (Colo. 2001)).

The test developed in *Frye v. United States* is applicable to the admission of novel scientific evidence. *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997), overruled by implication in *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

***Frye* test has not been abandoned in Colorado** as an exclusive test of admissibility of certain expert testimony, but its application remains very narrow. *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

***Frye* test may be used only if proffered scientific evidence is based on novel scientific devices and processes** involving the evaluation of physical evidence. *People v. Perryman*, 859 P.2d 263 (Colo. App. 1993); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

The test established in *Frye v. United States* requires a showing of (1) general acceptance in the relevant scientific community of the underlying theory or principle, and (2) general acceptance in the relevant scientific community of the techniques used to apply that theory or principle. *Fishback v. People*, 851 P.2d 884 (Colo. 1993); *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

In evaluating novel scientific evidence under the *Frye* test, a court must identify the scientific theory, techniques used, and relevant scientific community at issue and then consider the evidence presented at trial, scientific literature on the state of the science in question, and rulings from other jurisdictions employing the same admissibility questions. *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997).

Test for admissibility of expert testimony that does not deal with scientific devices or processes is whether the testimony will assist the trier of fact to understand the evidence or fact in issue. *Colwell v. Mentzer Invs., Inc.*, 973 P.2d 631 (Colo. App. 1998).

To determine the admissibility of this type of testimony, the court must hold an in limine proceeding to balance the reliability of the scientific principles upon which the testimony rests with the likelihood that the testimony may overwhelm or mislead the jury. *Colwell v. Mentzer Invs., Inc.*, 973 P.2d 631 (Colo. App. 1998).

Applying this test, the court did not abuse its discretion in admitting testimony concerning the effect of stress on causing multiple sclerosis to become symptomatic. *Colwell v. Mentzer Invs., Inc.*, 973 P.2d 631 (Colo. App. 1998).

Neither of the tests established in *Frye v. United States* or *Daubert v. Merrell Dow Pharmaceuticals* is applicable to dog-tracking evidence because it does not depend upon any scientific device, method, or process. *People v. Brooks*, 950 P.2d 649 (Colo. App. 1997), *aff'd*, 975 P.2d 1105 (Colo. 1999).

Instead, such evidence concerns a subject of common knowledge: Some dogs can track. While specialized knowledge is involved, the reliability of a particular track is typically demonstrated by evidence that is easily understood by a jury such as the handler's experience, knowledge, and training. *People v. Brooks*, 950 P.2d 649 (Colo. App. 1997), *aff'd*, 975 P.2d 1105 (Colo. 1999).

Elements of a proper foundation for dog tracking evidence listed in *Brooks v. People*, 975 P.2d 1105 (Colo. 1999).

Harmless error to admit dog tracking evidence, despite improper foundation, where dog handler later testified she and the dog had worked together for five years and performed numerous narcotics sniffs, and that the dog had never alerted officers about money determined to be clean. *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), *aff'd* in part and *rev'd* in part on other grounds, 69 P.3d 1029 (Colo. 2003).

***Frye* test does not apply to shoe print identification.** The expert's comparative process involves no "manipulation" of evidence, and an understanding of the techniques used is readily accessible to the jury. *People v. Perryman*, 859

P.2d 263 (Colo. App. 1993); *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Frye test should not have been used to exclude evidence related to the results of automobile collision experiments with human volunteers as the tests did not involve a novel scientific process or device applied to the manipulation of physical evidence, but exclusion was nonetheless proper as the trial court did not rely exclusively on the Frye test but also applied C.R.E. 402 and this rule. *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

Concerns which may arise in the implementation of otherwise generally accepted techniques go to the weight to be accorded to scientific or technical evidence and not to the admissibility of such evidence. *Fishback v. People*, 851 P.2d 884 (Colo. 1993).

Evidence derived from multiplex DNA testing systems was admissible under this rule based on the supreme court findings that multiplex systems are generally reliable, questions as to the reliability of a specific type of multiplex system go to the weight of the evidence, and the specific multiplex systems used in this case had been deemed reliable by other courts. Further, the court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion, delay, waste of time, or needless presentation of cumulative evidence under C.R.E. 403. *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Quantitative electroencephalogram (QEEG), which is a computer enhanced electroencephalogram that compares a patient's brain activity with the activity of normally functioning brains, is not generally accepted in the community of clinicians who treat brain injured patients and QEEG evidence is thus not admissible. *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997).

But videofluoroscopy (VF), which is a videotaped x-ray motion picture of a patient's bones and soft tissue structures in motion, is generally accepted by the relevant community of chiropractic professionals and VF evidence is thus admissible. *Tran v. Hilburn*, 948 P.2d 52 (Colo. App. 1997).

The water court properly excluded results derived from surface and ground water models because of a lack of reliability caused by a variety of technical failures by the expert witnesses. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

Exclusion of testimony held abuse of discretion where oral surgeon had testified as to standard of care for general dentist after the trial court had accepted the witness as an expert in both fields, neither the defendant nor the court had objected to the surgeon's qualification as an expert witness at the time of his testimony, and

surgeon had testified that the standard of care for extraction of tooth would be the same for both practitioners. Surgeon's statement, in response to questioning of court, that he could not testify to the overall standard of care for general dentists goes to the weight to be accorded to testimony rather than to its admissibility. *Sanchez v. Lauffenburger*, 784 P.2d 855 (Colo. App. 1989).

Attorneys may testify as experts with respect to insurance industry standards. *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43 (Colo. App. 1997).

CPA qualified as expert in accounting. A trial court has discretion in determining the qualifications of an expert and the admissibility of expert evidence. That discretion is properly exercised where a certified public accountant is properly qualified as an expert in accounting and he testifies only regarding his professional opinions as a CPA which have to be made by him in the performance of his duties. *Andrikopoulos v. Broadmoor Mgt. Co.*, 670 P.2d 435 (Colo. App. 1983).

Police officers employed in crime lab may testify as experts. A trial court does not abuse its discretion in allowing police officers employed in the crime laboratory to testify as experts when the technicians have qualifications as experts based on technical training and pretrial experience, and the jury is adequately instructed on the weight to be given expert testimony and opinion evidence. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

There is no requirement that a forensic chemistry expert follow a "written analytical method" before his or her expert testimony may be admitted. Based on the totality of the circumstances, the trial court did not abuse its discretion in admitting the expert testimony without a "written analytical method". *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008).

Testimony concerning Mexican culture did not constitute specialized knowledge that would assist the trier of fact, and exclusion of proffered expert testimony did not deprive defendant of his constitutional right to present a defense. *People v. Salcedo*, 985 P.2d 7 (Colo. App. 1998), rev'd on other grounds, 999 P.2d 833 (Colo. 2000).

Fact that witness not college graduate does not preclude his testifying as expert. The fact that a police officer is not a college graduate does not preclude his testifying as an expert on the basis of other technical training and pretrial experience. *White v. People*, 175 Colo. 119, 486 P.2d 4 (1971).

Error not found in allowing handwriting expert to testify. *People v. Drumright*, 181 Colo. 137, 507 P.2d 1097 (1973).

Jury is not bound by the testimony of expert witnesses, which must be considered and

weighed as that of other witnesses. *People v. King*, 181 Colo. 439, 510 P.2d 333 (1973).

A medical opinion is admissible if founded on reasonable medical probability. *Thirsk v. Ethicon, Inc.*, 687 P.2d 1315 (Colo. App. 1983).

These rules, not the standard of "reasonable medical probability", govern the admissibility of expert testimony. To the extent earlier cases approve of this standard, they are overruled. *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

Internist not allowed to testify regarding the practice of surgeons. Trial court did not abuse its discretion in refusing to allow internist to testify to the standards of practice of surgeons in the Denver metropolitan area when proponent failed to demonstrate that the standards of care in the two fields are in fact similar, and there was testimony that the standards of practice concerning the need for surgery followed by surgeons differ from the standards of practice followed by internists. *Connelly v. Kortz*, 689 P.2d 728 (Colo. App. 1984).

Dispositive consideration in ruling on admissibility of medical witness' expert testimony regarding whether the defendant, who practices in another school of medicine, has adhered to or deviated from the requisite standard of care should be (1) whether the expert is, by reason of knowledge, skill, experience, training, or education, so substantially familiar with the standard of care applicable to the defendant's specialty as to render the witness' opinion testimony as well-informed as would be the opinion of an expert witness practicing the same specialty as the defendant, or (2) whether the standard of care for the condition in question is substantially identical for both specialties. *Melville v. Southward*, 791 P.2d 383 (Colo. 1990).

Expert's testimony of personal practices may be admissible if an expert testified concerning the applicable standard of care because (1) expert's personal practices may help jurors understand why that standard of care is followed; (2) testimony regarding personal practices may either bolster or impeach the credibility of the expert; and, (3) each expert addressed the applicable standard of care. *Wallbank v. Rothenberg*, 74 P.3d 413 (Colo. App. 2003).

Testimony of orthopedic surgeon should not have been admitted on the issue of podiatrist's alleged negligence. The plaintiff failed to establish that the orthopedic surgeon was so substantially familiar with the standard of care for podiatric surgery as to render his opinion testimony as well-informed as that of a podiatrist and failed to establish that the standard of care for the surgery was substantially identical for both the practice of orthopedic surgery and podiatry. *Melville v. Southward*, 791 P.2d 383 (Colo. 1990).

Neuropsychologists are not per se unqualified to speak on the causation of organic brain injury, but a court must satisfy the two-part approach to questions arising under this rule. *Huntoon v. TCI Cablevision of Colo.*, 969 P.2d 681 (Colo. 1998).

Trial court did not err when it permitted a physician accepted as an expert in plastic and reconstructive surgery and the care of burn patients to testify that he had discontinued a steroid treatment after burn victim reported gynecological symptoms where physician was not offering an expert opinion on gynecological and obstetrical medicine but rather was giving the reasons for his course of treatment, which were based on the burn victim's physical response to the treatment. *Simon v. Coppola*, 872 P.2d 10 (Colo. App. 1993).

In a trial for sexual assault on a child, the trial court did not err in admitting testimony by the child's therapist, a social worker, about the characteristics present in sexually abused children, the presence of similar characteristics in the child, and the purpose of therapy since such testimony does not rise to the level of an improper assertion that the child was telling the truth and the testimony would assist the jury in determining a fact in issue. *People v. Cordova*, 854 P.2d 1337 (Colo. App. 1992).

In a first-degree sexual assault trial, testimony of counselor consisting of general comments based on her observations of victim's demeanor following alleged sexual assault was not inadmissible as amounting to a scientific diagnosis of rape trauma syndrome, as long as counselor did not use scientific terminology, discuss theory, or state an opinion as to whether she believed victim. *People v. Farley*, 712 P.2d 1116 (Colo. App. 1985), *aff'd*, 746 P.2d 956 (Colo. 1987).

The trial court did not err by allowing expert testimony in sexual assault case because the lay notion of what behavior follows being raped may not be consistent with the behavior that social scientists have found. This satisfies the test that expert testimony be helpful to the jury. Further, rape trauma syndrome evidence has repeatedly been held to be reliable. *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004).

Denial of effective counsel. Admission of testimony of defense-retained handwriting expert called by prosecution constitutes denial of effective assistance of counsel. *Perez v. People*, 745 P.2d 650 (Colo. 1987).

Expert witness evidence not admissible. Where expert witness' opinion evidence would not assist the trier of fact in understanding the evidence and where evidence is not of a technical or complex nature, expert testimony is not admissible under this rule. *People v. Snook*, 729 P.2d 1026 (Colo. App. 1986), *aff'd*, 745 P.2d 647 (Colo. 1987).

This rule was not intended to allow expert testimony on the issue of whether a witness is telling the truth. *People v. Snook*, 729 P.2d 1026 (Colo. App. 1986), *aff'd*, 745 P.2d 647 (Colo. 1987).

Court properly excluded defendant's expert heat of passion testimony because the heat of passion mitigator does not apply when a person seeks out the highly provoking act in question, as defendant did here. Therefore, trial court properly excluded the testimony since it would not have been helpful to the jury. *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

Expert's testimony that victim's statements are consistent with the medical diagnosis do not constitute a subjective opinion concerning the veracity of victim's statements, therefore the testimony may be properly admitted. *People v. Wittrein*, 198 P.3d 1237 (Colo. App. 2008), *rev'd* on other grounds, 221 P.3d 1076 (Colo. 2009).

Doctor's testimony that she could not imagine that victim's story was fabricated was improper since it was an opinion that victim was telling the truth. *People v. Wittrein*, 198 P.3d 1237 (Colo. App. 2008), *aff'd*, 221 P.3d 1076 (Colo. 2009).

However, the error was invited by defense counsel's questioning, so reversal is not required. *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

While expert opinion on whether children generally have the sophistication to lie about having experienced a sexual assault is admissible, neither a lay nor expert witness may give opinion testimony with respect to whether a witness is telling the truth on a specific occasion. Such testimony invades the province of the jury with respect to its determination of credibility. *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).

Expert testimony on "rape trauma syndrome" admissible on issue of victim's delay in reporting sexual assault where testimony concerned only existence of syndrome and did not involve specific diagnosis of victim. *People v. Hampton*, 746 P.2d 947 (Colo. 1987).

Defense may present expert testimony as to defendant's state of mind in order to bolster a claim of self defense in a homicide case. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

Expert testimony on posttraumatic syndrome admissible on issue of child victim's delay in reporting sexual assault, where testimony of expert did not address opinion as to truthfulness of child's statements. *People v. Fasy*, 829 P.2d 1314 (Colo. 1992).

Expert's testimony was properly received to aid the jury in understanding the typicality of reactions by young boys who have been subjected to sexual abuse. Here expert's testimony had been general and she had emphasized that

none of her testimony was to be taken as an endorsement of the credibility of any individual. *People v. Morrison*, 985 P.2d 1 (Colo. App. 1999), *aff'd* on other grounds, 19 P.3d 668 (Colo. 2000); *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

Trial court did not abuse its discretion by finding that an expert's explanation of possible child behaviors and reactions would be helpful to the trier of fact and was admissible. *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

Admissibility of expert testimony based on results of absorption inhibition testing in rape case. Since the absorption inhibition method has been recognized as based upon accepted scientific principles, trial court admission of such evidence based upon an offer of proof was a proper exercise of discretion. *People v. Banks*, 804 P.2d 203 (Colo. App. 1990).

Testimony by voice-print expert is not sufficiently reliable to be admissible. *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

Investigating police officer determined to be expert. An investigating police officer may give expert opinion if the subject is complex, is susceptible to opinion evidence, and the witness is qualified to give an opinion. *Eggert v. Mosler Safe Co.*, 730 P.2d 895 (Colo. App. 1986).

Trial court did not err in refusing to permit expert testimony on the factors affecting the reliability of eyewitness identification. *People v. Beaver*, 725 P.2d 96 (Colo. App. 1986).

Expert testimony on the reliability of eyewitness identification is not per se admissible. Rather, admissibility of such evidence is left to the trial court's discretion. The trial judge must consider both this rule and C.R.E. 403 in determining the admissibility of such evidence and such determination may not be reversed unless it is manifestly erroneous. *Campbell v. People*, 814 P.2d 1 (Colo. 1991).

Trial court did not err in admitting results of a defendant's breath-alcohol test and allowing expert witness to testify about alcohol's effect on a person's inhibitions. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), *rev'd* on other grounds, 19 P.3d 15 (Colo. 2001).

The trial court has broad discretion to evaluate on a case by case basis whether expert testimony on the issue would assist the trier of fact to understand evidence or to determine facts in issue. The appellate court will not reverse the trial court's ruling to admit or exclude such expert testimony unless the ruling is manifestly erroneous. *People v. Kemp*, 885 P.2d 260 (Colo. App. 1994).

Admissibility of experience-based specialized knowledge that is not dependent on a scientific explanation depends on whether the evidence is reasonably reliable information that will assist the trier of fact, which question requires the court to find that the testi-

mony on the subject would be useful to the jury and that the witness is qualified to render an opinion on the subject. *Brooks v. People*, 975 P.2d 1105 (Colo. 1999); *Salcedo v. People*, 999 P.2d 833 (Colo. 2000).

Trial court erred in excluding expert testimony on reliability of eyewitness identification where eyewitness identification of defendant was the only substantial element of the prosecution's case, eyewitnesses expressed high confidence in their identification of defendant, and proffered expert testimony would have shown a poor relationship between the confidence of eyewitnesses, in general, and the reliability of such witnesses' testimony. *People v. Campbell*, 847 P.2d 228 (Colo. App. 1992).

Three-part test under equivalent federal rule applied in *People v. Campbell*, 847 P.2d 228 (Colo. App. 1992).

Where challenged testimony addressed a collection of behaviors which are typical of children who have been sexually abused, the fact that some of these behaviors were observed as occurring in the victim serves the proper purposes of corroborating the testimony of the victim and does not make such testimony inadmissible. The testimony of the dynamics of child sexual assault could be used by the jury to understand the evidence and determine facts in issue and was properly admitted. *People v. Woertman*, 786 P.2d 443 (Colo. App. 1989).

Expert testimony concerning drug courier profile was not properly admitted because it was not helpful to the jury since it was inherently subjective, of dubious reliability, and logically irrelevant, and because its probative value was substantially outweighed by a risk of misleading the jury. *Salcedo v. People*, 999 P.2d 833 (Colo. 2000).

Present or former employees of the insurance industry are not the only persons qualified to render expert opinions about its operation. Attorneys with extensive experience in workers' compensation who have dealt extensively with defendant and other insurance companies may testify as experts regarding the standard of good faith conduct of an insurer. *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990).

Trial court did not abuse discretion by not accepting a convict to testify as an expert witness in parole procedures. *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992).

District court did not abuse discretion in denying habeas corpus petitioner proffered expert witness. Although witness, a fellow inmate of the petitioner, had some training and experience with habeas corpus petitions and other parole issues, trial court cannot be found to have abused its discretion in refusing to accept the witness as an expert in administrative procedures concerning parole. *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992).

This rule contained the appropriate test to determine the admissibility of expert testimony when the process used by the expert involved no manipulation of physical evidence and the understanding of the expert's techniques was readily accessible to the jury. The expert's testimony compared the characteristics of defendant's shoes with prints found near the victim's body. *People v. Perryman*, 859 P.2d 263 (Colo. App. 1993).

A court may rely on the testimony of a single witness in admitting scientific evidence under Frye if the witness is qualified to render an opinion as to the general acceptance of the techniques and the opposing party has the opportunity to cross-examine the expert. *People v. Perryman*, 859 P.2d 263 (Colo. App. 1993).

Where expert witness had 16 years' experience, was familiar with literature in the field, and had testified as an expert in numerous prior cases the court could rely on such expert's testimony without additional, independent expert testimony. *People v. Perryman*, 859 P.2d 263 (Colo. App. 1993).

Court did not abuse its discretion in deeming witness qualified to testify as an expert given witness's extensive experience, knowledge, and training. *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008).

Where expert's opinion is based upon reliable data, including un rebutted published studies and the treatment of at least 50 patients with exposure to the same toxic substance as that to which plaintiff was exposed, there was no error in admitting testimony regarding causation, as it is both helpful and competent. *Salazar v. Am. Sterlizer Co.*, 5 P.3d 357 (Colo. App. 2000).

Court did not abuse its discretion in concluding that a witness who was not a real estate appraiser could offer testimony concerning property values. The court was satisfied that the extent of the witness's training and experience qualified him to express an expert opinion regarding the effect of environmental contamination on property values even though he was not a real estate appraiser. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

Where substantial expert testimony concerning DNA testing supported admissibility of DNA evidence, it was within the trial court's discretion to allow consideration of the evidence. *People v. Lindsey*, 868 P.2d 1085 (Colo. App. 1993).

Trial court did not err in admitting DNA evidence where DNA expert could not definitely identify victim as a contributor of the DNA. Testimony was relevant in that it showed it was more probable than not that victim contributed to the DNA. *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008).

Although an expert witness should not dictate the law that a jury should apply, an expert witness is permitted, in the trial court's discretion, to refer to the facts of a case in legal terms. Thus, expert's testimony was admissible insofar as it concerned party's contention that insurer's conduct constituted bad faith based on purported violations of the Unfair Claims Settlement Practices Act. Such testimony was helpful as it served to explain complex issues of insurance company claims management practices. *Peiffer v. State Farm Mut. Auto. Ins.*, 940 P.2d 967 (Colo. App. 1996), *aff'd* on other grounds, 955 P.2d 1008 (Colo. 1998).

Any legal conclusions tendered by witness were elicited during her cross-examination by defendant's counsel, and thus, any error regarding witness's testimony was injected at defendant's behest. Such error cannot serve as grounds for reversal on appeal by defendant. *Bd. of Comm'rs v. Fixed Base Operators*, 939 P.2d 464 (Colo. App. 1997).

No abuse of discretion for trial court to permit expert testimony regarding the steps a reasonably prudent applicant in a *Torrens* action would take to ascertain the names of persons who claimed an interest in the property and to rely on that testimony in reaching its conclusions on due process issues. *Lobato v. Taylor*, 13 P.3d 821 (Colo. App. 2000), *rev'd* on other grounds, 71 P.3d 938 (Colo. 2002).

Expert testimony concerning reasons for victims' recantations is admissible in cases involving domestic violence. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

Trial court properly excluded expert witness's testimony as unnecessary and as improperly usurping the court's function because: (1) The testimony was not needed to describe or interpret the crime setting; (2) the testimony was not a question for the jury; (3) the testimony would not have assisted the trier of fact; and (4) an expert testifying as to issues of law may not simply tell the jury what result to reach. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Prosecutor's use of expert testimony regarding drug courier profiles as substantive evidence of defendant's guilt was improper, and, although a reasonable jury could have convicted on other evidence, the admissible evidence did not overwhelmingly establish defen-

dant's guilt, and there is a significant probability that the erroneously admitted testimony substantially influenced the jury's verdict, and thus was not harmless. *Salcedo v. People*, 999 P.2d 833 (Colo. 2000).

Court abused its discretion in admitting some lay opinions from mental health providers who had not been properly noticed as experts by the prosecution. Some of the opinions were expert opinions improperly admitted under the guise of lay opinion testimony. The improper testimony related to symptoms of specific mental illness and opinions about whether defendant suffered from mental illness. The evidence relied upon the witness' specialized knowledge and training and, therefore, went beyond the bounds of lay opinion. The error in this case was harmless since there was ample evidence in addition to the improperly admitted opinions. *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), *cert. denied*, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Mathematical probability statements or numerical conclusions by an expert witness on ergonomics properly excluded if (1) the conclusion was without statistical support in the record and (2) such a statement or conclusion implied a non-purposeful or non-intentional state of mind by the defendant and the expert was not qualified to testify regarding the defendant's psychological condition. *People v. Wilkerson*, 114 P.3d 874 (Colo. 2005).

Allowing police officer's testimony regarding the use of glass pipe and torch lighter to smoke methamphetamine not plain error. *People v. Malloy*, 178 P.3d 1283 (Colo. App. 2008).

Trial court improperly limited testimony of defendant's expert witness after prosecution had opened the door to this testimony and error was not harmless beyond a reasonable doubt. *Golob v. People*, 180 P.3d 1006 (Colo. 2008).

Applied in *People in Interest of K.A.J.*, 635 P.2d 921 (Colo. App. 1981); *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983); *People v. Jones*, 743 P.2d 44 (Colo. App. 1987); *People v. Williams*, 761 P.2d 258 (Colo. App. 1988); *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992); *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd*, 59 P.3d 979 (Colo. 2002); *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), *aff'd* in part and *rev'd* in part on other grounds, 69 P.3d 1029 (Colo. 2003); *Luster v. Brinkman*, 205 P.3d 410 (Colo. App. 2008).

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible

shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Federal Rule Identical.)

Source: Entire rule amended and adopted June 20, 2002, effective July 1, 2002.

COMMITTEE COMMENT

The Committee believes this rule is a substantial deviation from former Colorado law, but there are former cases lending partial support to the rule. *See*: Hensel Phelps Construction Co. v. U.S., 413 F.2d 701 10th Cir. (1969); Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962); Ison v. Stewart, 105 Colo.

55, 94 P.2d 701 (1939); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 P. 76 (1894). *See also*, Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977). Although not directly in point, we believe the case supports the last sentence of Rule 703. (Amended March 5, 1981, effective July 1, 1981.)

ANNOTATION

Law reviews. For article, "Admissibility of Governmental Studies to Prove Causation", see 11 Colo. Law. 1822 (1982). For article, "Hearsay as a Basis for Opinion Testimony", see 17 Colo. Law. 2337 (1988). "Opinion Testimony", see 22 Colo. Law. 1185 (1993). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002).

Fact that expert witness has not examined accused does not necessarily disqualify him from expressing his opinion based upon a hypothetical question, but such an opinion must be based on facts in evidence. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Neither collegiate degrees nor formal training in an established curriculum is necessarily required before one may be considered an expert in a particular field. *People v. Genrich*, 928 P.2d 799 (Colo. App. 1996).

Expert's opinion may not be predicated on others' opinions. An expert's opinion must not be predicated, in whole or in part, on opinions of others, expert or lay. *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979); *People v. District Court*, 647 P.2d 1206 (Colo. 1982).

Nor on facts varying from actual facts. An expert opinion buttressed by assumed facts at variance with the actual facts has no evidential efficacy. *High v. Indus. Comm'n*, 638 P.2d 818 (Colo. App. 1981).

Opinion based on information gained through hypnosis inadmissible. A psychiatrist will not be permitted to testify as to the mental state of the defendant if his opinion is based on information gained through hypnosis. *People v. Diaz*, 644 P.2d 71 (Colo. App. 1981).

Expert witness may be cross-examined. It is fundamental that an expert witness may be cross-examined concerning the basis of his opinion. *People v. Alward*, 654 P.2d 327 (Colo. App. 1982).

By learned treatises. Expert may be cross-examined using learned treatises even though he did not rely upon them in reaching his conclusions. *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979).

Competence to testify as to medical standards. Generally, practitioners of one school of medicine are not competent to testify as experts relative to standards of care required of practitioners of another school. *Greene v. Thomas*, 662 P.2d 491 (Colo. App. 1982).

However, a physician from one specialty may testify concerning the standard of care required of a physician with a different specialty, provided that the expert witness has acquired, through experience or study, more than just a casual familiarity with the standards of care of the defendant's specialty. *Greene v. Thomas*, 662 P.2d 491 (Colo. App. 1982).

Opinion may be based on facts or data not admissible in evidence. *Graefe & Graefe v. Beaver Mesa Exploration*, 695 P.2d 767 (Colo. App. 1984).

But this rule does not permit otherwise inadmissible facts or data contained in a report or statement to be admitted merely because the expert relied on them. *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002).

Expert's testimony itself is inadmissible when underlying basis for the expert opinions and recommendations is not accepted as reliable by the courts. Because of the lack of a scientific basis and reliability, it is inappropriate for an expert witness to rely on polygraph results to form or render an opinion. Trial court should not have listened to, or considered, the opinions of any experts based, in whole or in part, on polygraph examinations. *People ex rel. M.M.*, 215 P.3d 1237 (Colo. App. 2009).

Interpretation of blood test results by expert whose qualifications are established in

field of blood type testing was admissible evidence. *K.H.R. By and Through D.S.J. v. R.L.S.*, 807 P.2d 1201 (Colo. App. 1990).

It is permissible for an expert to rely on data which itself may be inadmissible. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

Expert's opinion may be based upon other reliable expert opinions due to the adoption of this rule. *Gold Rush Inv. v. G.E. Johnson Const.*, 807 P.2d 1169 (Colo. App. 1990):

Court did not err in admitting expert testimony of licensed physician whose opinion was based in part upon information received from psychiatrist in residency together with the physician's own examination of hospital records, charts, hospital admission data, and his own observations of respondent. *People in Interest of Martinez*, 841 P.2d 383 (Colo. App. 1992).

Admission of expert testimony was not abuse of trial court's discretion, where expert based his opinion on data contained in microscope slides and reports prepared by two other doctors since that opinion was based upon an opinion of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

Trial court did not abuse its discretion in allowing pediatrician to testify that rib fractures were a basis for the pediatrician's conclusion that child died as a result of shaken baby syndrome. *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001).

An expert may express an opinion based upon assumptions that have a reasonable basis in the evidence so long as the information is of the type reasonably relied upon by experts in the field of expertise. *Vento v. Colo. Nat'l Bank-Pueblo*, 907 P.2d 642 (Colo. App. 1995).

Reliance upon facts not personally observed but which have been reasonably re-

lied upon by experts in the same field is an acceptable basis of expert opinion and the trial court has broad discretion in determining whether the requirements governing expert opinions have been satisfied and whether the expert's testimony is admissible. *Gold Rush Investments, Inc. v. Johnson*, 807 P.2d 1169 (Colo. App. 1990); *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

An expert is not required on direct examination to disclose the underlying facts that form the basis for his or her opinion, however, nothing prevents an expert from doing so, and it was proper for expert in case at hand to give his opinion on how defendant's drawings and narratives related to a sexual homicide. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd* on other grounds, 59 P.3d 979 (Colo. 2002).

The weight to be accorded to the property valuation techniques of an expert in a marriage dissolution is for the trial court's determination, depending upon the court's assessment of the reliability of the data in a particular case. *In re Bookout*, 833 P.2d 800 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

The weight to be accorded to the valuation techniques of an expert is for the trial court to determine depending upon the court's assessment of the reliability of the data in a particular case. *In re Bookout*, 833 P.2d 800 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

Certainty goes to weight, not admissibility. Once a witness is qualified as an expert, the fact that the examination reveals that he or she cannot support the opinion with certainty goes only to the weight to be given the opinion and not its admissibility. *Vento v. Colo. Nat'l Bank-Pueblo*, 907 P.2d 642 (Colo. App. 1995).

Applied in *Stone v. Caroselli*, 653 P.2d 754 (Colo. App. 1982); *People v. Williams*, 654 P.2d 319 (Colo. App. 1982); *Jimerson v. Prendergast*, 697 P.2d 804 (Colo. App. 1985).

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Federal Rule Identical.)

COMMITTEE COMMENT

The present Federal and Colorado rules may conflict with preceding Colorado case law. (*Compare Bridges v. Lintz*, 140 Colo. 582, 346 P.2d 571 (1959) and *McNelly v. Smith*, 149 Colo. 177, 368 P.2d 555 (1962).) It is felt that the rule expresses the better alternative. The conflict arises in the area of lay witnesses testifying as to an ultimate issue of fact. In Colorado, case law says that he may testify concerning things which would "help" the jury to

understand the facts, but he may not render an opinion on the ultimate fact in issue. *Mogote-Northeastern Consolidated Ditch Co. v. Gallegos*, 70 Colo. 550, 203 P. 668 (1922). There are exceptions to the rule, and the law in Colorado can best be stated by quoting the following language: "It is reversible error to allow an opinion as to ultimate facts unless the witness testifies as an expert or his testimony invokes a description or estimate of condition,

value, etc. or when it is difficult or impossible to state with sufficient exactness the facts and

their surroundings.” *Town of Meeker v. Fairfield*, 25 Colo. App. 187, 136 P. 471 (1913).

ANNOTATION

Law reviews. For article, “Rule 704: Ultimate Issues and Legal Conclusions”, see 24 Colo. Law. 2175 (1995). For article, “Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704”, see 31 Colo. Law. 53 (March 2002).

A lay witness is not prohibited from testifying to an issue of ultimate fact, but the question which elicits the opinion must be phrased to ask for factual, rather than legal, opinion. *People v. Collins*, 730 P.2d 293 (Colo. 1986).

Admissibility under this rule cannot be determined in a vacuum. Rather, considerations of relevance, helpfulness, and potential for prejudice, confusion, or waste of time must be taken into account. *Hines v. D. & R.G.W. R. Co.*, 829 P.2d 419 (Colo. App. 1991).

Where operation of train was outside the knowledge of the ordinary person and a crucial issue in the case was the adequacy of the warning given to a pedestrian by sounding the train’s whistle, expert opinions were relevant, helpful, probative, and undergirded by sufficient facts to enable the jury to make its own evaluation. *Hines v. D. & R.G.W. R. Co.*, 829 P.2d 419 (Colo. App. 1991).

An expert may not usurp the function of the court by expressing an opinion of the applicable law or legal standards. *Quintana v. City of Westminster*, 8 P.3d 527 (Colo. App. 2000).

But in bench trial, where judge is presumed to ignore incompetent and inadmissible evidence, admission of lawyer’s testimony to help sort out complex business relationships and transactions was held not to be an abuse of discretion. *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998).

Expert witness invaded the province of the court as the giver of law when he explained the statute of limitations and described when a tort action begins to accrue. *Grogan v. Taylor*, 877 P.2d 1374 (Colo. App. 1993), rev’d on other grounds, 900 P.2d 60 (Colo. 1995).

Applied in *People v. Diaz*, 644 P.2d 71 (Colo. App. 1981); *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983); *People v. Ashley*, 687 P.2d 473 (Colo. App. 1984); *Zertuche v. Montgomery Ward & Co., Inc.*, 706 P.2d 424 (Colo. App. 1985); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986); *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), aff’d in part and rev’d in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Federal Rule Identical.)

Source: Entire rule amended and effective November 16, 1995.

COMMITTEE COMMENT

Although the present rule is contrary to Colorado case law, the Committee believes it to be the better view. The reasons for the retention of the proposed Federal rule as it is presently written are as follows. First, the rule does not disturb the requirement for a proper foundation for expert opinions. *City and County of Denver v. Lytle*, 106 Colo. 157, 103 P.2d 1 (1940). Secondly, the elimination of the requirement for preliminary disclosure of underlying facts or data has the effect of reducing the need for hypothetical questions, a goal which has been sought by a number of states. Thirdly: “If the objection is made that leaving it to the cross-

examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundations requirement.” *Advisory Committee’s Notes, Proposed Federal Rules. See also, Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957). Finally, it is clear that there is built-in safeguard in the discretionary power of the court to require prior disclosure.

ANNOTATION

Law reviews. For article, "Opinion Testimony", see 22 Colo. Law. 1185 (1993). For article, "Cross-Examining and Impeaching Expert Psychiatric Witnesses", see 26 Colo. Law. 75 (November 1997).

Cross-examination concerning basis of opinion permitted. It is fundamental that an expert witness may be cross-examined concerning the basis of his opinion. *People v. Alward*, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

Although this rule provides that the expert "may in any event be required to disclose the underlying facts or data on cross-examination", this principle is not absolute. When the expert has testified in summary fashion, the counsel of this rule is that the court should allow wide latitude for cross-examination.

However, the trial judge may certainly impose reasonable limits upon the cross-examination, and he should cut off the attack where its purpose is to support the cross-examiner's case by bringing out inadmissible hearsay rather than simply to undermine the expert's opinion. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

Medical experts are allowed to state the bases of their opinions. Where there exist various possible causes of an injury and the burden of proving causation rests on the plaintiffs, defendant's experts should be allowed to state their opinions and articulate the bases of their opinions in detail, as did plaintiffs' experts. *Thirsk v. Ethicon, Inc.*, 687 P.2d 1315 (Colo. App. 1983).

Applied in *Stone v. Caroselli*, 653 P.2d 754 (Colo. App. 1982).

Rule 706. Court Appointed Experts

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Federal Rule Identical.)

ANNOTATION

Court-appointed expert who expresses his professional opinion in trial is not a partisan, but is, in effect, the court's witness. *Massey v.*

District Court, 180 Colo. 359, 506 P.2d 128 (1973); *In re Lorenzo*, 721 P.2d 155 (Colo. App. 1986).

ARTICLE VIII HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him to be communicative.

COMMITTEE COMMENT

The change reflected in the Colorado rule was necessary, in the minds of the Committee members, because the Committee believed that

the word "assertion" was extremely unclear; the change is felt to be more precise.

(b) **Declarant.** A "declarant" is a person who makes a statement.
(*Federal Rule Identical.*)

(c) **Hearsay.** "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(*Federal Rule Identical.*)

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him, or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(*Federal Rule Substantially Identical, Except as to Rule 801(d)(1)(A).*)

COMMITTEE COMMENT

The last sentence of this Rule was added to track a corresponding change in F.R.E. 801(d)(2).

Source: (d)(2) amended and committee comment added November 25, 1998, effective January 1, 1999.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev.

227 (1979). For article, "Admissibility of Prior Testimony", see 11 Colo. Law. 398 (1982). For article, "Confrontation and Co-conspirators in

Colorado", see 14 Colo. Law. 385 (1985). For article, "Mythological Rules of Evidence", see 16 Colo. Law. 1218 (1987). For article, "Prior Inconsistent Statements", see 17 Colo. Law. 1977 (1988). For article, "Rules 801 and 613: Evidentiary Uses of Pleadings Filed in Other Cases", see 21 Colo. Law. 2389 (1992). For article, "Impeachment", see 22 Colo. Law. 1207 (1993). For article, "Rules 801 and 804: The Admissibility of Out-of-Court Statements Made by Present and Former Employees", see 26 Colo. Law. 77 (September 1997). For article, "Rule 801(c): Admissibility of a Testifying Witness's Extra-Judicial Statements", see 30 Colo. Law. 57 (May 2001). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002).

Purpose of hearsay rule. The constitutional right of confrontation and the hearsay rule stem from the same roots, and are designed to protect similar interests based on the premise that testimony is much more reliable when given under oath at trial, where the declarant is subject to cross-examination and the jury may observe his demeanor. *People v. Dement*, 661 P.2d 675 (Colo. 1983); *People v. Nunez*, 698 P.2d 1376 (Colo. App. 1984), *aff'd*, 737 P.2d 422 (Colo. 1987).

Electronically stored information on cellular telephone is not hearsay, and trial court properly admitted telephone into evidence. Stored information on cellular telephone is not considered hearsay because it is neither a "declarant" nor a "statement", as specified within the meaning of this rule. *People v. Buckner*, 228 P.3d 245 (Colo. App. 2009).

Testimonial hearsay is admissible only upon a showing of the unavailability of the declarant and a prior opportunity for cross-examination of the declarant by the defendant. *Compan v. People*, 121 P.3d 876 (Colo. 2005).

Test for admission of nontestimonial hearsay. Courts should continue to determine whether admission of hearsay deemed to be nontestimonial under the United States supreme court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), comports with the constitutional right of confrontation by applying the two-part test established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and applied in Colorado in *People v. Dement*, 661 P.2d 675 (Colo. 1983). That test requires that, for hearsay admitted in a trial to be constitutionally compliant, (1) the prosecution must either produce the declarant or show that the declarant is unavailable for trial, and, (2) if the declarant is unavailable, the out-of-court statements must bear sufficient indicia of reliability. *People v. Compan*, 100 P.3d 533 (Colo. App. 2004), *aff'd*, 121 P.3d 876 (Colo. 2005); *People v. Garrison*, 109 P.3d 1009 (Colo. App. 2004).

Victim's nontestimonial statements are inadmissible where prosecution fails to show victim's unavailability. *People v. Couillard*, 131 P.3d 1146 (Colo. App. 2005).

Where statements by victim were not testimonial, *Crawford v. Washington*, 541 U.S. 36 (2004) does not require defendant to have an opportunity to cross-examine victim. *People v. Gash*, 165 P.3d 779 (Colo. App. 2006).

Translation as hearsay. An interpreter serves as a language conduit for the declarant. Hence, admission of translated testimony is appropriate when the circumstances assure its reliability. Relevant factors include: (1) Whether actions after the translated conversation were consistent with the translated statements; (2) whether the interpreter had qualifications to interpret and language skill; (3) whether the interpreter had any motive to mislead or distort; and (4) which party supplied the interpreter. *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd* in part and *rev'd* in part on other grounds, 169 P.3d 662 (Colo. 2007).

Hearsay statements are presumptively unreliable since the declarant is not present to explain the statement in context nor subjected to cross examination. *Blecha v. People*, 962 P.2d 931 (Colo. 1998).

Statement not excluded where relevance goes to fact that statement made, not its truth. Where it is the fact that the statement was made, and not its truth or falsity, that is relevant, it is error to exclude the statement. *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982); *Hansen v. Lederman*, 759 P.2d 810 (Colo. App. 1988).

Prior statements admissible to create fact dispute. Where the record indicates that a party would be available as a witness at the trial of the matter and would be subject to cross-examination, her prior statements would be admissible to create a fact dispute to be resolved by the trier of fact. *People in Interest of K.A.J.*, 635 P.2d 921 (Colo. App. 1981).

Entire statement not admitted to rehabilitate testimony where only portion relevant. The trial court does not err in refusing to admit an entire tape recording of a statement made by the defendant after his arrest for the purpose of rehabilitating his testimony, when only a portion of the recording was relevant to rebut the prior inconsistent statement used by the prosecution for impeachment purposes. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979).

However, when victim is impeached with respect to credibility, all prior consistent statements are admissible, not just those that are directly related to specific facts in question. *People v. Tyler*, 745 P.2d 257 (Colo. App. 1987); *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994); *People v. Elie*, 148 P.3d 359 (Colo. App. 2006).

Colorado permits an extrajudicial identification of a defendant as substantive evidence and as an exception to the hearsay rule. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Furthermore, this exception is extended to extrajudicial identifications heard or observed by third person. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Reasonable to expect person hearing accusatory statement to deny same. Underlying the adoptive admission exemption from normal hearsay concepts is the general assumption that it would be reasonable to expect any person who hears a statement accusing him or her of misconduct to deny such statement. *People v. Green*, 629 P.2d 1098 (Colo. App. 1981); *People v. Pappadiakis*, 705 P.2d 983 (Colo. App. 1985), *aff'd sub nom. Peltz v. People*, 728 P.2d 1271 (Colo. 1986).

Prerequisites to admission of adoptive admission statement. Before admitting any adoptive admission statement into evidence, a trial court must determine preliminarily, normally by means of an in camera hearing, that the party offering the statement can produce evidence to support the factual conclusions that the defendant heard and understood the statement, had knowledge of the contents thereof, and was free from any emotional or physical impediment which would inhibit an immediate response. *People v. Green*, 629 P.2d 1098 (Colo. App. 1981).

Adoption of accusatory statement through silence closely scrutinized. The assumption that a defendant adopts an accusatory statement through his silence is a weak one, and evidence of such statements must be scrutinized with special concern in criminal cases, where there are constitutional limits to the permissible inferences from a defendant's silence. *People v. Green*, 629 P.2d 1098 (Colo. App. 1981).

Remarks by any accomplices in presence of defendant are admissible, an analogous situation being a coconspirator's exception to the hearsay rule. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

A statement by a party's coconspirator made during the course and furtherance of the conspiracy is admissible hearsay, if it is shown the declarant and the party were members of the conspiracy and the statement was made in the course and in furtherance of the conspiracy. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

The prosecution, as the proponent of a co-conspirator's statement, bears the burden of establishing by a preponderance of the evidence that there was a conspiracy, that the defendant and declarant were members of the conspiracy, and the declarant made the statement during the course and in furtherance of the conspiracy. The assistant manager's statements were in furtherance of the assistant manager's

role in the conspiracy to conceal defendant's identity and, thus, admissible. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

Codefendant's declaration made during joint adventure. A trial court may consider the statement of an alleged coconspirator in determining whether the prosecution has established the evidentiary conditions for admissibility so long as the statement itself is not the sole basis for establishing those foundational requirements. *People v. Montoya*, 753 P.2d 729 (Colo. 1988); *People v. Esch*, 786 P.2d 462 (Colo. App. 1989); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990); *People v. Rivera*, 56 P.3d 1155 (Colo. App. 2002).

A statement made by a party is admissible hearsay when offered against the party making it. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

Admission by a party opponent held not to be hearsay. *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

Since certain of the defendant's statements regarding the rental of VCR items, the failure to return them, and the method of payment were admissions by a party-opponent and therefore not hearsay, the non-hearsay evidence in the trial court record was of sufficient quantity and strength to satisfy the prosecutor's responsibility to establish probable cause. *People v. Horn*, 772 P.2d 108 (Colo. 1989).

Attorney's response to a request for investigation in a disciplinary proceeding was an admission by a party-opponent and was not hearsay. The fact that part of the attorney's response was inconsistent with the attorney's testimony at trial is not a consideration under subsection (d)(2). *People v. Meier*, 954 P.2d 1068 (Colo. 1998).

Statements made by attorney concerning a matter within the course of attorney's employment may be admissible against the party who retained the attorney. *In re Amich*, 192 P.3d 422 (Colo. App. 2007).

Passenger's statement that juvenile had exclaimed that he intended to "outrun the cop" was not hearsay and was admissible as an admission of a party opponent. *People v. T.R.*, 860 P.2d 559 (Colo. App. 1993).

Guidelines in insurance contract not admissible under subsection (d)(2). Although defendant signed an insurance contract for malpractice insurance containing risk management guidelines as a condition of obtaining coverage, such guidelines are not admissible as an adoption by defendant as the applicable legal standard of professional care owed to his patients where plaintiff sought to show that defendant did not adhere to such standards. *Quigley v. Jobe*, 851 P.2d 236 (Colo. App. 1992).

The documents could not have been admitted under subsection (d)(2). *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Statement made by defendant to expert witness offered to establish the basis for the expert's opinion is not hearsay and it is error to exclude it. *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

Statements offered to demonstrate the defendant's state of mind rather than the truth of the matter asserted would have substantiated defendant's affirmative defense that he had taken his daughter from the custody of his ex-wife because he believed his daughter was being abused. *People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

Defendant's own statement held admissible. *People v. Berger-Levy*, 677 P.2d 351 (Colo. App. 1983).

Former testimony admissible at subsequent trial. Defendant's testimony from prior trial at which he was acquitted does not constitute hearsay and is admissible under this rule as defendant's statement in his individual capacity. *People v. Arrington*, 682 P.2d 490 (Colo. App. 1983).

Under subsection (d)(1)(B), a statement is not hearsay if: (1) The declarant testifies at trial and is subject to cross-examination; (2) the statement is consistent with the declarant's testimony; and (3) it is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *People v. Segura*, 923 P.2d 266 (Colo. App. 1995).

Subsection (d)(1)(B) encompasses only those statements made by the victims prior to when the opportunity to fabricate similar stories allegedly arose. *People v. Segura*, 923 P.2d 266 (Colo. App. 1995).

While the victims' prior consistent statements rebutted a charge of fabrication and were made before the alleged fabrication, the statements were properly admitted under subsection (d)(1)(B). *People v. Segura*, 923 P.2d 266 (Colo. App. 1995).

Subsection (d)(1)(B) allows admission of sexual assault victim's prior consistent statements in police report when defense is consent, thus calling into question victim's credibility. *People v. Tyler*, 745 P.2d 257 (Colo. App. 1987).

Subsection (d)(1)(B) allows admission of recalled witness's prior consistent statements to investigating officer when defendant's attorney, on cross-examination, has called into question witness's credibility. *People v. Salazar*, 920 P.2d 893 (Colo. App. 1996).

Subsection (d)(1)(B) allows admission of two statements by the defendant, where the defendant first introduced the statements and thereby waived any objection to the introduction of the rest of the statements by the prosecution as explanatory material. *People v. Espinoza*, 989 P.2d 178 (Colo. App. 1999).

Prior consistent statements of child-victim of sexual assault may be used for rehabilitation when a witness's credibility has been attacked, as such statements are admissible outside of this rule. Prior consistent statements were found to be admissible where they were relevant to the jury's determination of whether the impeaching statements really were inconsistent with the child-victim's trial testimony, where the defense attempted to discredit the child-victim's testimony in its entirety, where there was no evidence that the prosecution relied upon the child-victim's prior consistent statement as substantive support for its case thereby implicating subsection (d)(1)(B) of this rule, and where the content of the witness's testimony regarding the child-victim's statement was merely repetitive of her own testimony. *People v. Eppens*, 979 P.2d 14 (Colo. 1999).

One requirement for admitting hearsay statement of a coconspirator is that the prosecution must first establish, by independent evidence, that a conspiracy exists and that the defendant is a participant. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982); *People v. Nunez*, 698 P.2d 1376 (Colo. App. 1984), *aff'd*, 737 P.2d 422 (Colo. 1987); *People v. Lewis*, 710 P.2d 1110 (Colo. App. 1985); *People v. Reyher*, 728 P.2d 333 (Colo. App. 1986).

Joint participant is considered coconspirator even where no conspiracy has been charged. *People v. Small*, 631 P.2d 148 (Colo. 1981).

Testimony properly admissible. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), *cert. denied*, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

Statements by joint participants in a conspiracy are admissible against all its members if made in furtherance of and during the course of the illicit relationship. *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Best*, 665 P.2d 644 (Colo. App. 1983).

But proponent of the evidence must establish to the trial court's satisfaction that the statement was made in furtherance of the conspiracy as well as in the course of the conspiracy. *Williams v. People*, 724 P.2d 1279 (Colo. 1986); *People v. Esch*, 786 P.2d 462 (Colo. App. 1989); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Coconspirator exception does not apply to statements made after conspiracy has ended. *People v. Armstrong*, 704 P.2d 877 (Colo. App. 1985).

Court erred in prohibiting defendant, on hearsay grounds, from eliciting evidence of what he and an alleged coconspirator said to one another. Nonhearsay verbal act evidence is admissible on the issue of whether a conspiratorial agreement existed because the statement is admitted merely to show that it was actually made, not to prove the truth of what was as-

serted in it. *People v. Scarce*, 87 P.3d 228 (Colo. App. 2003).

Adoption of subsection (d)(2) relating to the admissibility of defendant's confession does not supercede the corpus delicti doctrine, which is a substantive rule of law. The doctrine holds that a conviction cannot be based upon the uncorroborated confession of a defendant. *People v. Robson*, 80 P.3d 912 (Colo. App. 2003).

No further need under C.R.E. 901 to authenticate documentary evidence that satisfied requirements of subsection (d)(2)(B). Based upon witness testimony, ALJ committed no abuse of discretion in admitting record of request for purchase of political time and an agreement form for non-candidate issue advertisements as having been sufficiently authenticated under C.R.E. 901(b)(1). As to admissibility of affidavit of performance used to indicate dates, airtimes, and the district in which the advertisements were broadcast, ALJ correctly held that political committee's agent would not have authorized payment of invoices if he doubted advertisements aired during relevant time period and in relevant legislative district. There was no need to further authenticate affidavit of performance because agent's conduct manifested "belief in its truth" under subsection (d)(2)(B). Collectively, these documents support ALJ's findings that during relevant time period political committee arranged to broadcast television advertisements opposing legislative candidate to voters in candidate's district. *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207 (Colo. App. 2008).

Statement admissible under subsection (d)(2)(D). A statement by an employee made during the term of his employment concerning a subject matter within the scope of employment is admissible. *Halliburton v. Pub. Serv. Co.*, 804 P.2d 213 (Colo. App. 1990).

Independent insurance adjuster's statement tending to show that equipment had been vandalized, hence damage would be covered under policy, admissible notwithstanding that adjuster was not formally empowered to make coverage determinations. *South Park Aggregates, Inc. v. Northwestern Nat. Ins. Co.*, 847 P.2d 218 (Colo. App. 1992).

Interrogatory response and report of subcontractor's employee on city's ventilation system was admissible under subsection (d)(2)(D) in city's action against contractor and subcontractor for defects in design and construction of city hall building. Response and report qualified as statement offered against a party made by that party's agent or servant concerning a matter within the scope of his agency or employment during the existence of the relationship. *City of Westminster v. MOA, Inc.*, 867 P.2d 137 (Colo. App. 1993).

Testimony of two nurses was sufficient to show that a statement made by agent of hospital was within the scope of subsection (d)(2)(D). *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Statements admissible under subsection (d)(2)(E) as statements of coconspirator do not satisfy confrontation rights. A showing of reliability is also required. *Nunez v. People*, 737 P.2d 422 (Colo. 1987); *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Evidence held properly admitted as a statement of a coconspirator. *People v. Watson*, 668 P.2d 965 (Colo. App. 1983).

Statements concerning the furtherance of the planned deception of the insurance companies was in furtherance of the conspiracy to commit third degree arson. *People v. Peltz*, 701 P.2d 98 (Colo. App. 1984), *aff'd*, 728 P.2d 1271 (Colo. 1986).

Statements made after the purpose of the conspiracy has been accomplished are inadmissible under subsection (d)(2)(E) unless they are so connected with the purpose of the conspiracy as to be a part of the *res gestae*. For such statements, there must be specific evidence of a plan of concealment to demonstrate that the conspiracy is pending when the statements are made. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

Coconspirator statements made after the conspirators attain the object of the conspiracy are not admissible under this hearsay exception unless the proponent demonstrated an express original agreement among the coconspirators to continue to act in concert in order to cover up, for their own self protection, traces of the crime after its commission. *Blecha v. People*, 962 P.2d 931 (Colo. 1998).

Secrecy plus overt acts of concealment do not establish an express agreement to act in concert in order to conceal the crime. *Blecha v. People*, 962 P.2d 931 (Colo. 1998).

Evidence held hearsay. *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982).

Defendant's inconsistent statement on relevant matter held admissible. *People v. Christian*, 632 P.2d 1031 (Colo. 1981).

Witness' statement to detective was not properly admitted under subsection (d)(1)(A) since the witness refused to answer the prosecutor's questions at trial and therefore gave no testimony with which any prior statement could be inconsistent. *People v. Newton*, 940 P.2d 1065 (Colo. App. 1996), *aff'd*, 966 P.2d 563 (Colo. 1998).

Generally, a witness' out-of-court statements cannot be used to bolster his trial testimony. However, a prior consistent state may be admitted for the purpose of rehabilitation after a witness has been impeached by a prior

inconsistent statement. *People v. Andrews*, 729 P.2d 997 (Colo. App. 1986).

If credibility of a witness is at issue, the jury should have access to all relevant facts, including consistent and inconsistent statements and the reasons for possible fabrications. *People v. Andrews*, 729 P.2d 997 (Colo. App. 1986).

Trial court properly concluded that videotaped statements were admissible under subsection (d)(1)(B) as non-hearsay prior consistent statements and to the extent that the evidence was cumulative, there was no abuse of the trial court's discretion under the circumstances. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Admission of prior consistent statement not limited to those made prior to the inconsistent statement. *People v. Andrews*, 729 P.2d 997 (Colo. App. 1986).

Statements held not hearsay. Statements are admissible where such statements were not admitted for the purpose of establishing their veracity, but rather, to provide background necessary to understand/ conversation between witness and defendant. *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989).

Accident reports are admissible where they are offered to prove the manufacturer's notice of prior incidents and not for their veracity. *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991).

There is no right of confrontation and no hearsay preclusion when the utterances are not offered for their truth, but are offered to provide the context in which the defendant's statements were made. *People v. Arnold*, 826 P.2d 365 (Colo. App. 1991).

Statements in report of independent medical examiner were admissible for the purpose of establishing that an automobile insurance company had a reasonable basis for refusing to reimburse plaintiff's claimed medical expenses. *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43 (Colo. App. 1997).

Taped statement of ALJ during parole hearing was not hearsay where it was offered to prove notice to defendant and not the truth of the matter asserted. *People v. Taylor*, 74 P.3d 396 (Colo. App. 2002).

Statement includes non-verbal conduct intended to be communicative. *People v. Bowers*, 773 P.2d 1093 (Colo. App. 1988), *aff'd*, 801 P.2d 511 (Colo. 1990).

Refusal to allow defendant to call her cellmate to testify as to statements defendant made to her during course of trial was proper where defendant was not available to prosecutor for cross-examination concerning possibility of recent fabrication or improper influence or motive. *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986).

Child's use of anatomically correct dolls and gestures were part and parcel of hearsay

statements and are inadmissible without independent corroborative evidence. *People v. Bowers*, 773 P.2d 1093 (Colo. App. 1988), *aff'd*, 801 P.2d 511 (Colo. 1990).

Use of mannequin by prosecution to demonstrate how the victim was tied was not a "statement" but was an illustration of trial testimony. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Statement by a husband to his wife about the fraudulent nature of his personal injury claim against his employer was an admission not subject to the hearsay exclusion. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

Trial court erred in denying, as hearsay, cross-examination of a wife as to her prior inconsistent statements regarding admissions by the wife's spouse as to the fraudulent nature of his personal injury claim against his employer. *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

Court erred in barring prior consistent statement. Wife's prior consistent statement to attorney should have been admitted to rebut prosecution's implication that defendant's wife's testimony was the result of a recent fabrication or improper influence or motive. *People v. Ambrose*, 907 P.2d 613 (Colo. App. 1994).

News article offered for truth of its assertions is inadmissible hearsay. *People v. Morise*, 859 P.2d 247 (Colo. App. 1993).

Court erred in admitting inadmissible hearsay evidence from prosecution's expert witness who bolstered her testimony by stating her work had been subject to peer review. *People v. Griffin*, 985 P.2d 15 (Colo. App. 1998).

Prosecution satisfies minimum requirements for use of hearsay at preliminary hearing if it: (1) Presents some competent nonhearsay evidence that addresses an essential element of the offense; and (2) presents the hearsay evidence through a witness who is connected to the offense or its investigation rather than someone merely reading from a report. In this case, the prosecution satisfied the status elements of the offense through nonhearsay testimony and produced the victim's testimony (hearsay) through the investigating officer who was familiar with the case. *People v. Huggins*, 220 P.3d 977 (Colo. App. 2009).

Court's failure to apply correct standard for use of hearsay at preliminary hearing was abuse of discretion. Applying the correct standard, the evidence presented at the preliminary hearing established probable cause to believe the defendant committed the charged offenses. *People v. Huggins*, 220 P.3d 977 (Colo. App. 2009).

Applied in *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981); *Nat'l Sur. Corp. v. Citizens State Bank*, 651 P.2d 460 (Colo. App. 1982);

People v. Handy, 657 P.2d 963 (Colo. App. 1982); *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983); *Banek v. Thomas*, 697 P.2d 743 (Colo. App. 1984), *aff'd*, 733 P.2d 1171 (Colo. 1986); *People v. Johnson*, 701 P.2d 620 (Colo. App. 1985); *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd in part and rev'd in part on other grounds*, 749 P.2d 952 (Colo. 1988); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986); *Jacob v. Com. Highland Theatres*,

Inc., 738 P.2d 6 (Colo. App. 1986); *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987); *People v. Pinkey*, 761 P.2d 228 (Colo. App. 1988); *Bayless v. Milstein*, 765 P.2d 1069 (Colo. App. 1988); *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994); *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999); *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd in part and rev'd in part on other grounds*, 148 P.3d 178 (Colo. 2006).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

Rationale behind rule. Hearsay rule generally forbids evidence of out-of-court utterances to prove facts asserted in them because of the lack of opportunity to test, by cross-examination, the accuracy and truth of the statements offered. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

No case law or common law exceptions. The language of this rule does not permit any exception based upon "case law" or "common law" decisions to its prohibition against the admission of hearsay evidence. *People v. Rosenthal*, 670 P.2d 1254 (Colo. App. 1983).

Inadmissible hearsay evidence not transformed into competent evidence by testimony of observations. Inadmissible hearsay evidence is not transformed into competent evidence by permitting a witness to testify as to his own observations when the effect is the same as admitting inadmissible hearsay on statements or conduct which are not in evidence. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Burden of proof that statement falls within hearsay exception. The prosecution has the burden of showing that a statement falls within an exception to the hearsay rule. *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983).

Even if it is established that defendant has forfeited his or her right to confront a witness, the reliability of the evidence must still be ensured according to the standards of the rules of evidence. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007).

Where defendant's counsel made a deliberate, tactical choice to introduce bystander's hearsay statement into case, defendant invited any error that may have resulted from its introduction. Therefore, hearsay admission did

not violate defendant's right to confront the witnesses against him. *People v. Gibson*, 203 P.3d 571 (Colo. App. 2008).

Erroneous admission of hearsay evidence, without a showing by prosecution that evidence was admissible under exception to hearsay rule or that declarant was unavailable, was harmless error where there was abundant evidence upon which jury could find the defendant guilty without the hearsay testimony. Erroneous admission of hearsay evidence does not violate the defendant's right to confront witnesses against him where the utility of confrontation was extremely remote. *People v. Shipman*, 747 P.2d 1 (Colo. App. 1987).

Any error in admitting letters that contained inadmissible hearsay was harmless. Without examining the contents of the letters, the court presumed the jury followed the trial court's instruction not to consider the letters for the truth of their contents. When considered in light of the substantial other evidence, any error in admitting the content of the letters was harmless. *People v. Manier*, 197 P.3d 254 (Colo. App. 2008).

Section 13-25-129 permits hearsay testimony related to acts of mental and emotional abuse in a child abuse case. The term "health" in § 18-6-401 (1) includes both physical and mental well-being. *People v. Sherrod*, 204 P.3d 472 (Colo. App. 2007), *rev'd on other grounds*, 204 P.3d 466 (Colo. 2009).

Officer's testimony regarding informant was not hearsay. Informant's statements regarding drug deal's arrangements, the suppliers and their street names, and identifying them when they arrived at the scene were introduced to show why the officers went to that particular location to arrest defendant, not for the truthfulness of those statements. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

Defendant may not rely upon an affidavit at a suppression hearing without attempting

to call the affiant. The affidavit is hearsay evidence and thus may not properly be admitted at a suppression hearing. The affidavit is sufficient to determine whether a hearing is necessary, but not to actually determine the matter itself. *People v. Warner*, 251 P.3d 567 (Colo. App. 2010).

Applied in *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980); *People v. Mann*, 646

P.2d 352 (Colo. 1982); *Nat'l Sur. Corp. v. Citizens State Bank*, 651 P.2d 460 (Colo. App. 1982); *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982); *Goodboe v. Gabriella*, 663 P.2d 1051 (Colo. App. 1983).

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Spontaneous present sense impression.** A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

COMMITTEE COMMENT

The change reflected above was based on the fact that neither immediacy nor spontaneity would be guaranteed by the Federal rule. Colorado case law requires that a present sense impression be instinctive and spontaneous in order to be admissible. *See Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 P. 1051 (1911). It

was felt that the requirements set forth in that opinion constitute a greater guarantee of trustworthiness than the Federal rule, *i.e.*, spontaneity is the most important factor governing trustworthiness. This is especially true when there is no provision that the declarant be unavailable as a witness.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(Federal Rule Identical.)

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Federal Rule Identical.)

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(Federal Rule Identical.)

COMMITTEE COMMENT

See: Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); and § 8-53-103(2)(a) & (b),

C.R.S. (Workmen's Compensation Act of Colorado).

(5) **Recorded recollection.** A past recollection recorded when it appears that the witness once had knowledge concerning the matter and; (A) can identify the memorandum or record, (B) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (C) can testify to its accuracy. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

COMMITTEE COMMENT

The change reflected above was made because the Federal rule is more restrictive than the Colorado rule, which does not require absence of a present recollection to be expressly

shown as a preliminary to use of recorded recollection. *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962).

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule makes no reference to any objective standard of trustworthiness, *e.g.*, regularity with which records are kept. *See* Colorado cases: *Patterson v. Pitoniak*, 173 Colo. 454, 480 P.2d 579 (1971); *Moseley v. Smith*, 170 Colo. 177, 460 P.2d 222 (1969); *Seib v. Standley*, 164

Colo. 394, 435 P.2d 395 (1967); *Rocky Mountain Beverage v. Walter Brewing Company*, 107 Colo. 63, 108 P.2d 885 (1941); *Hobbs v. Breen*, 74 Colo. 277, 220 P. 997 (1923); *Powell v. Brady*, 30 Colo. App. 406, 496 P.2d 328 (1972).

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(Federal Rule Identical.)

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule is somewhat broader than the provisions of § 25-2-117, C.R.S., and respecting marriage records is desirable because the evi-

dentiary use of the book of marriages provided in § 90-1-20, C.R.S. 1963, was repealed in 1973.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(Federal Rule Identical.)

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(Federal Rule Identical.)

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(Federal Rule Identical.)

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(Federal Rule Identical.)

COMMITTEE COMMENT

The age of the record or regularity of keeping are immaterial to admissibility. The content of fact is not limited to pedigree or genealogy.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

COMMITTEE COMMENT

The generic term "property" used in the Federal rule indicates an intent that the rule apply to documents relating to interests in both real property and personal property. The term "filed" has been added to render the rule appli-

cable to personal property under Colorado law: the Uniform Commercial Code, the Colorado Rules of Civil Procedure, and § 30-10-103, C.R.S., all refer to "filing" documents affecting an interest in personal property.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule extends admissibility beyond case law and statutes. *E.g.*, *McClure v. Board of Commissioners of La Plata County*, 19 Colo.

122, 34 P. 763 (1893); *Wright v. People in the Interest of Rowe*, 131 Colo. 92, 279 P.2d 676 (1955); *Michael v. John Hancock Mutual Life*

Insurance Co., 138 Colo. 450, 334 P.2d 1090 (1959). Statutes more restrictive than the rule

are §§ 38-35-102, 38-35-104, 38-35-105, 38-35-107, and 38-35-108, C.R.S.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule liberalizes the hearsay exception for ancient documents by eliminating proof of execution (*see* general statement for this principle in 32A C.J.S., *Evidence*, Sec. 744, page 32) and, further, reduces the required age of such docu-

ment to twenty years from thirty years. For Colorado authorities on the subject, *see* McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953) and § 38-35-107, C.R.S.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(Federal Rule Identical.)

COMMITTEE COMMENT

Colorado authorities affecting this rule are: 4-2-724, C.R.S.; Continental Divide Mining Investment Company v. Bliley, 23 Colo. 160, 166, 46 P. 633, 635 (1896); Willard v. Mellor, 19 Colo. 534, 36 P. 148 (1894); Kansas Pacific

R.R. Company v. Lundin, 3 Colo. 94 (1876); Rio Grande Southern R.R. Company v. Nichols, 52 Colo. 300, 123 P. 318 (1912); Johnson v. Cousins, 110 Colo. 540, 135 P.2d 1021 (1943).

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence and may be received as exhibits, as the court permits.

COMMITTEE COMMENT

Unlike the Federal Rule, the Colorado Rule allows the learned treatises to be admitted as exhibits in the discretion of the court. The former Colorado Rule seemed to be that only if such treatise had been relied upon by the witness in forming his opinion might it be admit-

ted. *Denver City Tramway v. Gawley*, 23 Colo. App. 332, 129 P. 258 (1912); *Wall v. Weaver*, 145 Colo. 337, 358 P.2d 1009 (1961); *Ross v. Colo. Nat'l Bank*, 170 Colo. 436, 463 P.2d 882 (1970).

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(Federal Rule Identical.)

COMMITTEE COMMENT

The former Colorado rule limited such evidence to reputation among persons related by blood or marriage to the family in question.

Epple v. First Nat'l Bank of Greeley, 143 Colo. 319, 352 P.2d 796 (1960).

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule is thought consistent with the former Colorado rule. See § 38-44-101, C.R.S., re establishing disputed boundaries.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(Federal Rule Identical.)

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty or *nolo contendere*, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(Federal Rule Identical, Except that a Plea of *Nolo Contendere* was Excluded in the Federal rule.)

COMMITTEE COMMENT

The rule represents Colorado law by its inclusion of a *nolo contendere* plea. § 13-90-101, C.R.S., construed to include a *nolo contendere*

plea in *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968).

(23) **Judgment as to personal, family, or general history or boundaries.** Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Federal Rule Identical.)

COMMITTEE COMMENT

A judgment, under the circumstances stated, creates the reputations, and is admissible sub-

ject to the limitations applicable to evidence of reputation.

(24) [Transferred to Rule 807]

COMMITTEE COMMENT

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to Rule 807. This was done to facilitate addi-

tions to Rules 803 and 804. No change in meaning is intended.

Source: (24) added November 15, 1984, effective April 1, 1985; (24) transferred to Rule 807 and committee comment added, effective January 1, 1999; (6) amended and adopted June 20, 2002, effective July 1, 2002.

ANNOTATION

- I. General Consideration.
- II. Exceptions.
 - A. In General.
 - A.5. Spontaneous Present Sense Impression.
 - B. Excited Utterance.
 - C. Then Existing Mental, Emotional, or Physical Condition.
 - D. Statements for Purposes of Medical Diagnosis or Treatment.
 - E. Recorded Recollection.
 - F. Records of Regularly Conducted Activity.
 - G. Records of Vital Statistics.
 - H. Learned Treatises.
 - I. Public Records and Reports.
 - J. Other Exceptions.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 227 (1979). For article, "Admissibility of Prior Testimony", see 11 Colo. Law. 398 (1982). For article, "Admissibility of Governmental Studies to Prove Causation", see 11 Colo. Law. 1822 (1982). For article, "The Residual Exceptions to the Hearsay Rule: A Reappraisal", see 13 Colo. Law. 1818 (1984). For article, "Offering or Opposing Hearsay Under the Residual Exceptions — A User's Guide", see 14 Colo. Law. 1620 (1985). For article, "Mythological Rules of Evidence", see 16 Colo. Law. 1218 (1987). For article, "Hearsay as a Basis for Opinion Testimony", see 17 Colo. Law. 2337 (1988). For article, "The Residual Exception to the Hearsay Rule: Form Follows Substance", see 22 Colo. Law. 1197 (1993). For article, "Res Gestae Evidence", see 24 Colo. Law. 1567 (1995).

Purpose of hearsay rule. The constitutional right to confrontation and the hearsay rule stem from the same roots, and are designed to protect similar interests based on the premise that testimony is much more reliable when given under oath at trial, where the declarant is subject to cross-examination and the jury may observe his demeanor. *People v. Dement*, 661 P.2d 675 (Colo. 1983).

Testimony found to be hearsay. *Sante Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

Applied in *Morrison v. Bradley*, 622 P.2d 81 (Colo. App. 1980); *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981); *People in Interest of K.A.J.*, 635 P.2d 921 (Colo. App. 1981); *Great W. Food Packers, Inc. v. Longmont Foods Co.*, 636 P.2d 1331 (Colo. App. 1981); *Scruggs v. Ottelman*, 640 P.2d 259 (Colo. App. 1981); *Fasso v. Straten*, 640 P.2d 272 (Colo. App.

1982); *People v. District Court*, 664 P.2d 247 (Colo. 1983); *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

II. EXCEPTIONS.

A. In General.

Burden of proof that statement falls within exception. The prosecution has the burden of showing that a statement falls within an exception to the hearsay rule. *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983); *Oldsen v. People*, 732 P.2d 1132 (Colo. 1986).

The proponent of evidence carries the the burden of establishing the preliminary facts essential to satisfy a particular hearsay exception. *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).

Both § 13-25-129 and this rule are residuary rules and apply only if hearsay is not otherwise admissible under the other hearsay exceptions. Section 13-25-129 applies only to hearsay statements not otherwise admissible by statute or court rule. Because § 13-25-129 and this rule have different requirements for the admission of hearsay statements, confusion and inconsistent results may occur if either residuary provision may be applied to the same hearsay statement of a child sexual assault victim which is otherwise not admissible into evidence. Since the more specific provision should prevail, § 13-25-129 is the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

Declarant must not lack testimonial qualifications. To fall within any exception to the hearsay rule, the declarant himself must not lack the testimonial qualifications that would be required for him to take the stand. *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983).

Declarant's testimonial incapacity renders statement inadmissible. Where the testimonial incapacity of the declarant stems from a psychiatric disorder, and is such that the guarantees of trustworthiness implicit in the exceptions to the hearsay rule would not vitiate the incompetency, any testimony derived from that statement is not admissible. *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983).

A.5. Spontaneous Present Sense Impression.

Witness' testimony that her daughter had identified an obscene phone caller as the defendant immediately after perceiving the call-

er's voice was properly permitted as spontaneous present sense impression exception to the hearsay exclusion. *People v. Czemyrnski*, 786 P.2d 1100 (Colo. 1990).

Applied in *People v. Franklin*, 782 P.2d 1202 (Colo. App. 1989).

B. Excited Utterance.

Three requirements must be met for a statement to be admissible as an excited utterance. The event must be sufficiently startling to render normal reflective thought processes of the observer inoperative, the statement must be a spontaneous reaction to the occurrence, and direct or circumstantial evidence must exist to allow the jury to infer that the declarant had the opportunity to observe the startling event. *People v. Stephenson*, 56 P.3d 1112 (Colo. App. 2001); *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003); *People v. Garrison*, 109 P.3d 1009 (Colo. App. 2004).

Excited utterance exception. What is of critical significance to *res gestae*, section (2), is the spontaneous character of the statement and its natural effusion from a state of excitement. *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of C.R.E.); *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984).

Hearsay statements are admissible under the excited utterance exception if there is some occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative and if the statement of the declarant was a spontaneous reaction to the occurrence or event and not the result of reflective thought. *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

In determining whether a statement is admissible as an excited utterance, trial court is afforded wide discretion and that determination will not be disturbed on appeal if it is supported by the evidence. Here, trial court properly admitted into evidence an audiotape of a statement made by the victim during a 911 telephone call. The call was placed only 15 minutes after the victim was stabbed. Being stabbed is a startling event and, thus, it was within trial court's discretion to determine that the victim was still under the excitement or stress of the stabbing at the time the statement was made. *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004).

Exception not restricted to statements arising directly from startling event. Although in most instances the "startling event" will be the act or transaction upon which the legal controversy is predicated, such as an assault or accident, the excited utterance exception is not restricted only to statements arising directly out

of such events. *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982).

When the significance of a past event is revealed as a result of the startling event and is relevant, such testimony is admissible as an excited utterance exception to the hearsay rule exclusion. *People v. Ojeda*, 745 P.2d 274 (Colo. App. 1987).

Declarant may be witness to event. Under the hearsay exception for an "excited utterance", the declarant may be a bystander or witness to the event rather than an actual participant. *People v. Dement*, 661 P.2d 675 (Colo. 1983); *People v. Green*, 884 P.2d 339 (Colo. App. 1994).

Declarant must have observed startling occurrence. An implicit requirement to be met to qualify a statement as an excited utterance, admissible under the hearsay exception, is that enough direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling occurrence. *People v. Dement*, 661 P.2d 675 (Colo. 1983); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992); *People v. Green*, 884 P.2d 339 (Colo. App. 1994).

The threshold for satisfying the requirement that a declarant observed an event is minimal, and as long as there is evidence that leads the fact finder to reasonably infer that the declarant had the opportunity to observe the event that evidence should be permitted; the credibility of the witness and the weight to be given that evidence should be left to the fact finder. *People v. Green*, 884 P.2d 339 (Colo. App. 1994).

The rationale behind the excited utterance exception is founded on the general reliability attaching to statements made under the stress of excitement. *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982).

Unlike some other hearsay exceptions, excited utterance evidence is not limited to unavailable declarants. The reason is that the extrajudicial assertion is likely to be better than a statement from the witness at trial after time has permitted reflection or memory has faded. *People v. Dement*, 661 P.2d 675 (Colo. 1983).

Spontaneity and excitement sufficient guarantee of trustworthiness. The requirement of spontaneity and excitement subsumed by the *res gestae* exception furnishes a sufficient guarantee of trustworthiness implicit in the rationale of hearsay exceptions. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

Source of trustworthiness in child's statement. The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in the lack of capacity to fabricate rather than the lack of time to fabricate. *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982); *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991).

Courts look to the effect of a particular event upon a declarant and, in the case of young children, the element of trustworthiness underscoring the excited utterance exception is primarily in the lack of capacity to fabricate rather than the lack of time to fabricate. *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

Automobile collision qualifies as a "startling event". *Lovato v. Herrman*, 685 P.2d 240 (Colo. App. 1984).

A sexual assault may constitute a sufficiently startling event to admit hearsay statements of a child-victim. *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993).

Sexual assault and stabbing of victim constituted a startling event. Although the trial court acknowledged there was no way to know how much time had elapsed between the assault and the 911 phone call, there was substantial evidence in the record that the victim was hysterical at different times throughout the two-hour period that the victim made statements to the police officer. There was also testimony that during the two hours, the victim continually lapsed into French while speaking and repeatedly asked whether she was going to die. Furthermore, the officer testified that the victim was bleeding badly and was continually being examined and treated for injuries during the time the officer was with the victim. *People v. King*, 121 P.3d 234 (Colo. App. 2005).

The fact that the victim's statements were made in response to questions does not preclude them from being excited utterances. *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000); *People v. Garrison*, 109 P.3d 1009 (Colo. App. 2004); *People v. King*, 121 P.3d 234 (Colo. App. 2005).

The totality of the circumstances, including the severity of the victim's injuries, her agitated emotional state, and the brief time between the injury and the statements, supports the trial court's determination that the statements were admissible under this rule. *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000).

Statements by victim who was upset, crying, and in emotional and physical distress that were made in temporal proximity to defendant's yelling and assault of victim properly held to be excited utterances. *Compan v. People*, 121 P.3d 876 (Colo. 2005).

Contemporaneity not required. Contemporaneity of the act and the assertion is not required for the *res gestae* exception to the hearsay rule to be applicable. *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of C.R.E.); *People v. Handy*, 657 P.2d 963 (Colo. App. 1982); *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984).

Time interval of a half-hour between the alleged assault and the hearsay declaration admit-

ted under the *res gestae* exception did not constitute an impediment to the admissibility of the statement. *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of CRE).

But statement made after time interval of three hours in which declarant had several independent interludes of reflective thought was not admissible as an excited utterance. *People v. Stephenson*, 56 P.3d 1112 (Colo. App. 2001).

Temporal interval between event and statement not conclusive on admissibility. Although the temporal interval between the "startling event" and the child's statement is not without significance, it is not conclusive on the question of admissibility. *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982); *People v. Sandoval*, 709 P.2d 90 (Colo. App. 1985); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Exculpatory statement of defendant made hours after arrest not part of *res gestae*. Where hours after the defendant is placed under arrest, he gives an exculpatory statement to the police and the district attorney objects to the admission of the statement into evidence at trial on the ground that the statement is hearsay, his objection is valid, because the defendant's explanatory statement is not so contemporaneous that it can be considered part of the *res gestae*. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

Trial court to determine whether statement admissible. The trial court is in a preferred position to determine whether a particular event causes sufficient excitement in the declarant to render a statement admissible as an excited utterance. *People in Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982); *People v. Bashara*, 677 P.2d 1376 (Colo. App. 1983); *People v. Sandoval*, 709 P.2d 90 (Colo. App. 1985).

Criminal cases. Section (2), the "excited utterance" exception to the hearsay rule, is not unconstitutional as applied in every criminal case. *People v. Dement*, 661 P.2d 675 (Colo. 1983).

When declarant is unavailable, evidence admitted under this exception does not violate defendant's right to confront prosecution witnesses. *People v. Mitchell*, 829 P.2d 409 (Colo. App. 1991).

A declarant is unavailable in the constitutional sense when the prosecution makes a reasonable, good faith effort to produce a witness without success; however, in cases where the attempt to produce a witness would be futile, a reasonable effort by the prosecution may be no effort. *People v. Green*, 884 P.2d 339 (Colo. App. 1994).

Excited utterance is nontestimonial if not made under circumstances that would lead an objective witness to reasonably believe the statement would be available for use at a

later trial. *Compan v. People*, 121 P.3d 876 (Colo. 2005).

Testimony held admissible under the excited utterance exception to the hearsay rule. *People v. Jones*, 665 P.2d 127 (Colo. App. 1982); *Kielsmier v. Foster*, 669 P.2d 630 (Colo. App. 1983); *People v. Bashara*, 677 P.2d 1376 (Colo. App. 1983); *People v. Franklin*, 683 P.2d 775 (Colo. 1984); *People v. Sandoval*, 709 P.2d 90 (Colo. App. 1985); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986); *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993); *Canape v. Peterson*, 878 P.2d 83 (Colo. App. 1994); *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Testimony held inadmissible. Although bystanders to an event may be sufficiently affected by its excitement to have their utterances rendered reliable, and thus excepted from the rule against hearsay statements, in this case there was no evidence of the emotion or spontaneity required to qualify the statement of the unknown declarant as an excited utterance. *People v. Mares*, 705 P.2d 1013 (Colo. App. 1985); *People v. Green*, 884 P.2d 339 (Colo. App. 1994).

Trial court abused its discretion in admitting testimony as an excited utterance even though the interview took place shortly after the startling event of defendant's arrest. The statements did not relate to the startling event and instead related to events that had occurred weeks previously. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

Statements held inadmissible. *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986); *People v. Franklin*, 782 P.2d 1202 (Colo. App. 1989).

C. Then Existing Mental, Emotional, or Physical Condition.

Rationale for exception. The state of mind exception to the hearsay rule is based upon the truthworthiness of such statements which is presumed due to their spontaneity. *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

Statement must be made under circumstances indicating sincerity. The rule requires that such declarations relate to a then existing state of mind and that they must have been made under circumstances indicating sincerity. *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

Section (3) tracks the common-law definition of the state of mind exception. *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

Common-law rule. Under the common-law evidentiary rule, the tests applied to admit evidence of design or plan are "a present existing state of mind, something said in the usual course of things under the circumstances, and under circumstances excluding an ulterior pur-

pose". *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

Statements by an unavailable witness admitted pursuant to the state of mind hearsay exception do not violate a defendant's state or federal confrontation rights. The state of mind hearsay exception is firmly rooted. The reliability of such hearsay statements, therefore, is implied under the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and statements bear sufficient indicia of reliability to satisfy the second part of the Dement two-part test. Accordingly, trial court's failure to make a reliability determination regarding statements by an unavailable witness did not constitute plain error. *People v. Gash*, 165 P.3d 779 (Colo. App. 2006).

The state of mind exception to the hearsay rule is based upon the trustworthiness of spontaneous statements. The availability of the declarant is immaterial if the statement is made under circumstances indicating sincerity. Statements of present intent to engage in future conduct may be used as proof of the subsequent act. *People v. Nunez*, 698 P.2d 1376 (Colo. App. 1984), *aff'd*, 737 P.2d 422 (Colo. 1987).

Mental condition of sexual assault victim. Mother of sexual assault victim may testify that victim was fearful and distraught for several months after assault since such testimony is admissible under state of mind exception to the hearsay rule. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

Prohibition inapplicable when hearsay offered to prove state of mind. When hearsay is offered to provide the basis for the defendant's state of mind, the truth of the statement is not the criterion for admission, and the general hearsay prohibition does not apply. *People v. Burress*, 183 Colo. 146, 515 P.2d 460 (1973); *People v. Spring*, 713 P.2d 865 (Colo. 1985), *rev'd on other grounds*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 809 (1987).

When state of mind exception applicable. The state of mind exception to the hearsay rule, section (3), is not applicable to statements purportedly made by the victim in a case where the state of mind of the victim is not a material issue. *People v. Borrelli*, 624 P.2d 900 (Colo. App. 1980).

The more recent and better-reasoned cases allow hearsay expressions of a victim's fear of a defendant only where the state of mind of the victim is clearly relevant to a material issue in the case. *People v. Borrelli*, 624 P.2d 900 (Colo. App. 1980).

Out of court statements regarding the victim's fear of the defendant are admissible to explain the victim's state of mind. *People v. Cardenas*, 25 P.3d 1258 (Colo. App. 2000).

Assertion must depict declarant's, not another's, state of mind. Since the state of mind exception admits the assertion for the truth of

the matter asserted, it is basic to admissibility that the assertion essentially depict the declarant's then existing state of mind, as distinguished from a description of the acts or state of mind of another. *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Franklin*, 782 P.2d 1202 (Colo. App. 1989).

Statements of memory or belief are excluded from the state of mind exception. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Rule permits the introduction of statements of memory or belief to prove the fact remembered or believed as to the execution, revocation, identification, or terms of a declarant's will. *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998).

Statements of present intent of future conduct included. The state of mind exception encompasses statements of the declarant's present intent to engage in future conduct as proof of the subsequent act. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Victim's statement to police officer describing physical injuries within the scope of admissible evidence under the "then existing mental, emotional, or physical condition" exception. *Pena v. People*, 173 P.3d 1107 (Colo. 2007).

Applied in *Stephen Equipment Co. v. Baca*, 703 P.2d 1332 (Colo. App. 1985); *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986); *People v. McGrath*, 793 P.2d 664 (Colo. App. 1989).

D. Statements for Purposes of Medical Diagnosis or Treatment.

Admission of nontreating physician's recital of a defendant's statements. Nontreating physician's recital of a defendant's statements is admissible for the truth of the matters they contain. The test for admission reflects a trustworthiness rationale and is: First, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment. *People v. Stiles*, 692 P.2d 1124 (Colo. App. 1984).

Statements made by defendant to a non-treating physician should be admitted once it is established that the statements were made for the purpose of diagnosis or treatment, and were reasonably pertinent to diagnosis or treatment, and were relied upon by the physician in arriving at an expert opinion, without regard to any independent demonstration of trustworthiness. *King v. People*, 785 P.2d 596 (Colo. 1990).

However, even admission of testimony that is not pertinent to medical treatment or diagnosis may not be harmful error if it is merely cumulative of other evidence. *People v. Galloway*, 726 P.2d 249 (Colo. App. 1986).

Victim's statements to a paramedic admissible where statements were made in response

to standard questions designed to elicit facts necessary for medical diagnosis and treatment and where all circumstances show that the victim's motive in making the statements was to obtain treatment. *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000); *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Testimony of social worker, psychologist, and physician as to child's statements concerning sexual contact with her father were not admissible under the "medical exception" to the hearsay rule absent any evidence that the child was capable of recognizing, at the time of such statements, the need to provide accurate information for purposes of medical diagnosis or treatment. *Oldsen v. People*, 732 P.2d 1132 (Colo. 1986).

Evidence of plaintiff's past cocaine use not admissible under subsection (4) in medical malpractice case. Statements regarding plaintiff's past cocaine use were inadmissible hearsay where they were not made for the purpose of medical diagnosis or treatment, did not concern cocaine use around the time of the alleged malpractice, and were disputed and highly prejudicial. Hearsay statements relating to fault that are not relevant to diagnosis or treatment are inadmissible. *Haralampopoulos v. Kelly*, — P.3d — (Colo. App. 2011).

Doctors' diagnoses, recited and summarized in administrative law judge decision, did not come within the exception provided in section (4) because they did not constitute the patient's recitation of information necessary for diagnosis or treatment. *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002).

Self-serving statements of defendant concerning drug use upon being booked for murder did not qualify under this rule. Such statements were not made for the purpose of obtaining diagnosis from a health care professional, but as part of jail's routine procedures. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Victim's statements to nurse practitioner were inadmissible hearsay where the type of dispute or identity of the assailant was not necessary for or pertinent to the nurse practitioner's diagnosis or treatment. The record showed the challenged statements were cumulative of testimony by the victim and an investigating officer, therefore, any error in the admission of the challenged statements was harmless. *People v. Jaramillo*, 183 P.3d 665 (Colo. App. 2008).

Trial court did not commit reversible error in admitting hearsay statements made by victim to physician who examined her. The statements included the victim's description of the defendant's actions that had caused her pain and bleeding, to assist with his medical diagnosis. Moreover, the physician's testimony was cumulative of testimony provided by the victim,

the woman with whom the victim was residing, and the caseworker. *People v. Perez*, 972 P.2d 1072 (Colo. App. 1998).

E. Recorded Recollection.

This exception is inapplicable where a notation on a document refreshed a witness of his actions taken six weeks before trial and not so that he independently recalled the date of his conversation with the defendant that had taken place just before the accident for which defendant was on trial. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

F. Records of Regularly Conducted Activity.

Law reviews. For article, "C.R.E. 803(6): Applying the Business Records Exception to Third-Party Information", see 29 Colo. Law. 55 (May 2000). For article, "C.R.E. 803(6): Admissibility of Customer-Supplied Information Under Business Records Hearsay Exception", see 32 Colo. Law. 89 (September 2003).

Business record exception justified by trustworthiness. Where sufficient guarantees of trustworthiness and accuracy are present, application of the business record exception to hearsay evidence is justified. *People v. Holder*, 632 P.2d 607 (Colo. App. 1981); *Ford v. Bd. of County Comm'rs*, 677 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

Contractor's invoices are business records. Contractor's invoices, based on employee time sheets, are admissible as records kept in the regular course of business. *Herman v. Steamboat Springs Super 8 Motel, Inc.*, 634 P.2d 1005 (Colo. App. 1981).

Activities of government agencies may be considered business records for the purposes of Crim. P. 26.2, if the other requirements of the rule are met and the proper foundation is laid. *People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980) (case decided prior to effective date of C.R.E.).

Assessments made by condominium association on a quarterly basis admissible. *Chateau Chaumont Condo. v. Aspen Title Co.*, 676 P.2d 1246 (Colo. App. 1983).

Records prepared by another source, if adopted and integrated in the regular course of established business procedures into the records sought to be introduced are admissible even if the identity of the person whose first hand knowledge was the basis of a particular entry is not established. *Teac Corp. of Am. v. Bauer*, 678 P.2d 3 (Colo. App. 1984).

Fraud investigator's records for credit processing association are records of regularly conducted activity justifying admissibility of calcu-

lations based thereon. *People v. Burger-Levy*, 677 P.2d 351 (Colo. App. 1983).

Complaints filed by third parties with the Colorado attorney general's consumer fraud office do not qualify as business records because they are not part of the work product generated by that office. *Tincombe v. Colo. Const. & Supply Corp.* 681 P.2d 533 (Colo. App. 1984).

Doctors' diagnoses, recited and summarized in administrative law judge decision, did not qualify as medical records because they constituted a summary and interpretation of the records, not the records themselves, and in any event were not authenticated by the custodian or other qualified witness. *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002).

Police reports may qualify as business records because the drafters of the federal rule of evidence 803(6), identical to this rule, contemplated including police reports in the business records exception when the other requirements of the rule are met. *Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. App. 1985), aff'd on other grounds, 744 P.2d 43 (Colo. 1987).

But statements of defendant concerning his own drug use, upon being booked for murder, did not qualify under this rule. The business records exception requires that the source of the proffered information does not indicate lack of trustworthiness, and in the context of the case, the defendant's statements might properly be characterized as self-serving. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Specific requirement in § 16-3-309 (5) that laboratory testing technician be made available at trial upon timely request overrides general hearsay exception of subsection (6) of this rule. When timely request had been made, trial court erred in admitting laboratory report without technician's testimony as a business record. *People v. Williams*, 183 P.3d 577 (Colo. App. 2007).

Relevant and material business records, including computer records, qualify for the business records exception when supported by an adequate foundation showing that: (1) The records were made in the regular course of business; (2) those participating in the record making were acting in the routine of business; (3) the input procedures were accurate; (4) the entries were made within a reasonable time after the occurrence in question; and (5) the information was transmitted by a reliable person with knowledge of the event reported. *Benham v. Pryke*, 703 P.2d 644 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 67 (Colo. 1987); *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985); *Schmutz v. Bolles*, 800 P.2d 1307 (Colo. 1990); *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App.

1992); *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993).

The information contained in business records may be transmitted through a number of individuals as long as the chain of transmission begins with the individual who has actual knowledge of each person in the chain is acting in ordinary course of business. *Schmutz v. Bolles*, 800 P.2d 1307 (Colo. 1990).

The trial court erred in refusing to admit an investigative report of insurance adjuster because the report was prepared as part of the normal routine business practice necessary for each insurance file, the adjuster prepared the report using information he received from one in knowledge, and the report was prepared within a brief time after the adjuster received the information. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

Trial court did not abuse discretion in admitting computer records as business records even though the records were not authenticated pursuant to C.R.E. 901. Although C.R.E. 901 (b)(9) may be used to authenticate computer records, there is no requirement that computer records be authenticated only in this way. *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002).

Computer business records have a greater level of trustworthiness than an individually generated computer document. *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002).

Business records containing statements by an outsider are admissible when the information is provided as part of a business relationship between a business and the outsider and there is evidence that the business substantially relied upon the information contained in the records. Trial court did not abuse its discretion in admitting such records. *People in Interest of R.D.H.*, 944 P.2d 660 (Colo. App. 1997).

It was unnecessary to establish that document admitted under this rule was prepared by defendant's employee where defendant's chief financial officer testified that the document was received in the ordinary course of defendant's business, that the document was the type of document defendant routinely received from supplier, and that supplier did not inform defendant that document was inaccurate. *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993).

Trial court did not err in admitting certain documents offered in support of plaintiff's damage claim on grounds that documents constituted inadmissible hearsay where jury was instructed that documents were not being admitted for truth of matter asserted and counsel for defendant confirmed that no additional jury instruction was required. *Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993).

Security company's incident report inadmissible where there was no evidence as to: who recorded the report; whether the report was kept in the ordinary course of business; whether the security guard had knowledge of the truthfulness of the recorded information; whether a third party's statement in the report was sworn; or whether the statement was accurately translated by an interpreter in the regular course of business. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

Industrial commission files are business records. Industrial commission file used in good cause determination of untimely requests for review of referee's decision, pursuant to commission regulations enacted under an express grant of legislative authority, is admissible as a business records exception to the hearsay rule. *Kriegel v. Indus. Comm'n*, 702 P.2d 290 (Colo. App. 1985).

Accident reports may be admissible as business records. *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991).

Evidence provided an adequate basis for admission under section (6) of a medical record entry made by nurse. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Admission of transport note entered by nurse in transport team was not error. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Applied in *Ed Hackstaff Concrete, Inc. v. Powder Ridge Condo*, 679 P.2d 1112 (Colo. App. 1984); *Thirsk v. Ethicon, Inc.*, 687 P.2d 1315 (Colo. App. 1983); *People v. Lagunas*, 710 P.2d 1145 (Colo. App. 1985); *Adams County Dept. of Soc. Servs. ex rel. Tyler v. Tyler*, 714 P.2d 1333 (Colo. App. 1986); *Kelln v. Colo. Dept. of Rev.*, 719 P.2d 358 (Colo. App. 1986); *Jacob v. Com. Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986); *Columbia Sav. & Loan Ass'n v. Zelinger*, 794 P.2d 231 (Colo. 1990); *Lorenz v. Martin Marietta Corp., Inc.*, 802 P.2d 1146 (Colo. App. 1990), *aff'd*, 823 P.2d 100 (Colo. 1992).

G. Records of Vital Statistics.

Coroner's reports and death certificates. Coroner's reports qualify as public records, and death certificates are records of vital statistics. *Bernstein v. Rosenthal*, 671 P.2d 979 (Colo. App. 1983).

Admitting death certificate containing hearsay not error where jury instructed to ignore hearsay. The admission of a death certificate containing the statement that the victim was "helping neighbor investigate burglary of neighbor's store and shot by one of the burglars during this investigation", was not reversible error, particularly when the court later instructed the jury to ignore that portion of the

certificate, although it would be much better to practice to delete such as included hearsay. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

H. Learned Treatises.

Law reviews. For article, "C.R.E. 803(18): The Learned Treatise Exception to the Hearsay Rule", see 38 Colo. Law. 39 (March 2009).

Expert may be cross-examined using learned treatises even though he did not rely upon them in reaching his conclusions. *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979).

Hearsay evidence held properly admitted. Trial court held not to have erred in a sanity trial in admitting alleged hearsay testimony under the exception in section (18). See *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

Colorado driver handbook not a learned treatise under section (18). *Garcia v. Mekonnen*, 156 P.3d 1171 (Colo. App. 2007).

I. Public Records and Reports.

Complaints filed by third parties with the Colorado attorney general's consumer fraud office do not qualify as public records because they comprise unsubstantiated allegations, rather than "factual findings". *Tincombe v. Colo. Const. & Supply Corp.* 681 P.2d 533 (Colo. App. 1984).

Administrative law judge decision reciting doctors' testimony did not qualify as a public record because the recitations were not factual findings or conclusions of the agency, but merely summaries of the doctors' own statements. *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002).

Police booking reports fall outside of the exclusion contained in subsection (8)(B) for documents in criminal cases relating to matters observed by police or law enforcement and are thus admissible as public records. Unlike police investigative reports, booking reports do not raise concerns of trustworthiness or potential bias. Rather, they are documents routinely prepared in a non-adversarial setting by officials whose only motivation is to accurately and efficiently record uncontroversial information relating to the fact that an arrest was made, and not the facts leading to the arrest. *People v. Warrick*, __ P.3d __ (Colo. App. 2011).

Applied in *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd* in part and *rev'd* in part on other grounds, 749 P.2d 952 (Colo. 1988).

J. Other Exceptions.

Rule permits hearsay statement which has circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions to be

admitted if the court determines that it is offered as evidence of a material fact and if it is more probative on the point for which it is offered than any other evidence which its proponent could reasonably produce. *Abdelsamed v. New York Life Ins. Co.*, 875 P.2d 421 (Colo. App. 1992), *rev'd* sub nom. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Factors to be used to determine trustworthiness are: (1) The nature and character of the statement; (2) the relationship of the parties; (3) the motivation of the declarant; (4) the circumstances under which the statement was made; (5) the knowledge and qualifications of the declarant; (6) the existence or lack of corroboration; and (7) the availability of the declarant at trial for cross-examination. *Abdelsamed v. New York Life Ins. Co.*, 857 P.2d 421 (Colo. App. 1992), *rev'd* sub nom. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Test applied in *Abdelsamed v. New York Life Ins. Co.*, 857 P.2d 421 (Colo. App. 1992), *rev'd* sub nom. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Statement admissible under residual hearsay exception if: (1) The statement has equivalent circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of a material fact; (3) the statement is more probative than any other evidence that can be procured through reasonable efforts; (4) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence, and (5) the proponent of the statement must give the adverse party notice of the intent to offer the statement, including the name and address of the declarant. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

Statements of three deceased witnesses properly read into record under residual hearsay exception when all parties agreed to what would be read. *People v. Melanson*, 937 P.2d 826 (Colo. App. 1996).

Residual hearsay exception not adopted. The supreme court declined to adopt the residual exception without an opportunity for public comment and an effective date which would allow for uniform application. *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984) (decided prior to adoption of section (24)).

Reputation among family members concerning a person's date of birth is admissible hearsay. *People v. Buhrle*, 744 P.2d 747 (Colo. 1987).

Hearsay statements of child concerning sexual contact with her father which were testified to by a social worker, psychologist, and physician were sufficiently trustworthy to qualify as an exception to the hearsay rule and were admissible. *Oldsen v. People*, 732 P.2d 1132 (Colo. 1986).

Exception for judgment of previous conviction applied in *Banek v. Thomas*, 733 P.2d 1171 (Colo. 1986).

Evidence in a packet pertaining to one conviction admitted under § 16-13-102 that also is evidence of another separate and distinct conviction is admissible to prove the other separate and distinct conviction for habitual offender purposes. *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

Medical records have long been considered the prototype of business records for which admission as an exception to the hearsay rule is appropriate. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Admission of transport note entered by nurse in transport team was not error. The

trial court correctly determined that the entry met the requirements of paragraph (24). *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

Kelley blue book may be admitted under the market reports exception to the hearsay rule since the blue book is a market report generally used and relied upon by the public. *People v. Thornton*, 251 P.3d 1147 (Colo. App. 2010).

Applied in *People v. Guilbeaux*, 761 P.2d 255 (Colo. App. 1988).

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(3) or (4) his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

COMMITTEE COMMENT

The Federal Rule is substantially the same as the Colorado Rule; except there is no reference to subsection (b) (2) in the Colorado Rule, as there is no Colorado subsection (b) (2). As to testimony given at a preliminary hearing, *see People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979). This rule expands upon the former rule of evidence in Colorado. For authorities on the use of such evidence in Colorado, *see*: Rule 32 of Colorado Rules of Civil Procedure; Emerson

v. Burnett, 11 Colo. App. 86, 52 P. 752 (1898); *Daniels v. Stock*, 23 Colo. App. 529, 130 P. 1031 (1913); *Woodworth v. Gorsline*, 30 Colo. 186, 69 P. 705 (1902); *Henwood v. People*, 57 Colo. 544, 143 P. 373 (1914); *Gibson v. Gagnon*, 82 Colo. 108, 257 P. 348 (1927); *Duran v. People*, 156 Colo. 385, 399 P.2d 412 (1965); *Insul-Wool Insulation Corp. v. Home Insulation, Inc.*, 176 F.2d 502 (10th Cir. 1949).

(2) (No Colorado Rule Codified)

COMMITTEE COMMENT

The Federal rule relates to a statement under belief of impending death. The admissibility of

the dying declarations of a deceased person is governed by § 13-25-119, C.R.S.

(3) **Statement against interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule was revised, consistent with recent amendments to FRE 804(b)(3), only to clarify that corroborating circumstances are required regardless of whether a statement is offered to inculcate or exculpate an accused. See People v.

Newton, 966 P.2d 563 (Colo. 1998) (prosecutors seeking to admit statements against the accused must satisfy the corroboration requirement solely by reference to the circumstances surrounding its making)..

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule expanded the former Colorado rule to admit statements of unrelated associates.

Some independent proof of relationship under (B) will continue to be required.

(5) [Transferred to Rule 807]

COMMITTEE COMMENT

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to Rule 807. This was done to facilitate addi-

tions to Rules 803 and 804. No change in meaning is intended.

Source: (b)(5) added November 15, 1984, effective April 1, 1985; (b)(5) transferred to Rule 807 and (b)(5) committee comment added, effective January 1, 1999; (b)(3) and (b)(3) committee comment amended and effective January 13, 2011.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For comment, "Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse", see 60 Colo. L. Rev. 659 (1989). For article, "The Residual Exception to the Hearsay Rule: Form

Follows Substance", see 22 Colo. Law. 1197 (1993). For article, "Rules 801 and 804: The Admissibility of Out-of-Court Statements Made by Present and Former Employees", see 26 Colo. Law. 77 (September 1997).

Unavailability under subsection (a)(1). In order for a declarant to be considered "unavailable" under subsection (a)(1), the declarant must actually invoke the privilege before the

trial court, and the trial court must rule that the privilege is available. *People v. Rosenthal*, 670 P.2d 1254 (Colo. App. 1983).

Previous assertion of the privilege against self-incrimination by a witness for the defendant in an earlier proceeding was insufficient as a matter of law to satisfy the requirement of unavailability under subsection (a)(1). *People v. Barnum*, 23 P.3d 1237 (Colo. App. 2001), *aff'd* by operation of law, 53 P.3d 646 (Colo. 2002).

Declarant-codefendant in a criminal proceeding must be presumed unavailable for purposes of subsection (a) even if present in court. Otherwise, declarant who is a codefendant could create error by becoming "available" by deciding to testify only after hearsay statements against interest were admitted into evidence pursuant to this rule. *People v. Reed*, 216 P.3d 55 (Colo. App. 2008).

To satisfy the requirements of constitutional confrontation, a party offering a witness' former testimony must establish the present unavailability of the witness. Also, there must have been a sufficient opportunity for the accused to cross-examine the witness at the former hearing so as to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

C.R.C.P. 32 is an independent and alternative vehicle to section (b)(1) of this rule for admitting deposition testimony into evidence in civil cases. *Margenau v. Bowlin*, 12 P.3d 1214 (Colo. App. 2000).

The determinative inquiry of the availability of the declarant is not his or her availability at the time of the pretrial hearing but his or her availability at the time of trial. *Blecha v. People*, 962 P.2d 931 (Colo. 1998); *People v. Barnum*, 23 P.3d 1237 (Colo. App. 2001), *aff'd* by operation of law, 53 P.3d 646 (Colo. 2002).

Inability to remember prior testimony tantamount to denial. For the purpose of introducing the prior testimony of a witness, the witness' inability to remember a statement is tantamount to a denial that he made the statement. *People v. Baca*, 633 P.2d 528 (Colo. App. 1981).

Extrinsic evidence admissible to prove prior statement. Where a witness does not remember making a prior statement, extrinsic evidence is admissible to prove that the witness made the prior statement. *People v. Baca*, 633 P.2d 528 (Colo. App. 1981).

Where age is issue, party or witness may testify as to his age, and such testimony is competent evidence, being a generally recognized exception to the hearsay rule. *Maddox v. People*, 178 Colo. 366, 497 P.2d 1263 (1972).

Prior trial testimony admissible when party against whom it is offered had opportunity to cross-examine the witness fully at the prior proceeding. The scope and limits of

cross examination lie within sound discretion of trial court and absent showing of abuse of discretion does not constitute reversible error. *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987).

Whether declarant's statement was a statement against interest is applied in *People v. Shields*, 701 P.2d 133 (Colo. App. 1985).

Statement was not against the declarant's penal interest where the version of the declarant's statement proffered at hearing did not expose the declarant to criminal liability. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

Statements of criminal liability made by defendant offered for purposes of mitigation inadmissible under (b)(4) because they were in favor of rather than against defendant's penal interest. *People v. Atkins*, 844 P.2d 1196 (Colo. App. 1992); *People v. Orona*, 907 P.2d 659 (Colo. App. 1995).

Reliability of custodial statements. Whether a declarant who makes a statement against penal interest was in police custody when the statement was given is but one factor to be considered in determining whether the attendant circumstances confirm the statement's trustworthiness. *People v. Moore*, 693 P.2d 388 (Colo. App. 1984).

Subsection (b)(3) is identical to the federal rule and federal interpretation is persuasive authority of its meaning. *People v. Lupton*, 652 P.2d 1080 (Colo. App. 1982); *People v. Nyberg*, 711 P.2d 719 (Colo. App. 1985).

Subsection (b)(3) did not apply since the declarant was acquitted before the defendant's trial began and was therefore available to testify at that trial. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

Examination of corroborative circumstances within trial court's discretion. The examination of corroborative circumstances, in subsection (b)(3), is a matter of discretion for the trial court. *People v. Lupton*, 652 P.2d 1080 (Colo. App. 1982).

In addressing the question of corroboration, the trial court must balance all the evidence available. *People v. Nyberg*, 711 P.2d 719 (Colo. App. 1985).

In balancing whether sufficient corroborating circumstances exist, the examination focuses on when and to whom the statement was made, the presence or absence of corroborating evidence of the statement, the availability of the declarant to testify and, in the very real sense, whether the declarant's statement is truly against his penal interest, considering the likelihood of him being actually prosecuted. *People v. Lupton*, 652 P.2d 1080 (Colo. App. 1982).

In determining whether sufficient corroborating circumstances exist to permit introduction of a statement against interest into evidence, the trial court must examine, among other circum-

stances, when and to whom the statement is made and determine whether other independent evidence corroborates the contents of the statement. *People v. Harding*, 671 P.2d 975 (Colo. App. 1983).

The "unavailability" of a declarant for purposes of determining the admissibility of hearsay testimony rests on the good faith efforts made to produce such declarant, which efforts are based on a standard of reasonableness. *People v. Walters*, 765 P.2d 616 (Colo. App. 1988).

Test of good faith by prosecution in securing witness's attendance was shown where witness had been deported to Mexico despite protests by prosecution, was under orders to return for trial, had been subpoenaed by the defense, and was notified by the prosecution via a letter shortly before trial. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

Statements are not admissible pursuant to this rule where prosecution failed to prove the declarant's unavailability. *People v. Franklin*, 782 P.2d 1202 (Colo. App. 1989).

A witness with a physical or mental disability is unavailable in the constitutional sense only if the disability is of a nature that requiring the witness to testify would result in further physical or mental injury to the witness and is of such a permanency that the witness would continue to be unavailable even if a reasonable continuance of the trial were to be granted. *People v. Lyons*, 907 P.2d 708 (Colo. App. 1995).

Whether the declarant was unavailable is applied in *People v. Arguello*, 737 P.2d 436 (Colo. App. 1987).

Trial court was correct in refusing to treat witness as "unavailable" where witness testified extensively and, although her memory was selective, witness's selective memory lapses benefited defendant. *People v. Aguirre*, 839 P.2d 483 (Colo. App. 1992).

Court need not make specific findings to support conclusions that child is medically unavailable to testify due to emotional trauma pursuant to § 18-3-413 (4) when courts findings are based upon uncontradicted testimony of experts who had interviewed the children. *People v. Thomas*, 803 P.2d 144 (Colo. 1990).

Statement clearly against penal interest that happens also to implicate defendant was properly admitted under (b)(3) as an exception to the hearsay rule. *People v. Blecha*, 940 P.2d 1070 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998).

For the purpose of limiting application of the "residual exception" to the hearsay rule, a trial court should make on-the-record findings that a hearsay statement satisfies the prerequisites for admissibility under subsection (b)(5). *People v. Fuller*, 788 P.2d 741 (Colo. 1990).

Grand jury testimony of deceased must satisfy foundational requirements of subsection (b)(1) in order to be admissible. Party seeking admission of testimony must show a prior opportunity by the party against whom the testimony is offered to develop such testimony, and a similar motive to do so. In *re Lynde*, 922 F.2d 1448 (10th Cir. 1991).

In murder trial, victim's prior statements in verified complaint to obtain a restraining order were supported by circumstantial guarantees of trustworthiness and were properly admissible. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

Harmless error. Trial court's failure to establish that a hearsay statement satisfied the prerequisites for admissibility under subsection (b)(5) proved harmless error because the record revealed that the statements were supported by circumstantial guarantees of trustworthiness and that the statements were cumulative and did not substantially influence the verdict or affect the fairness of the trial proceedings. *People v. Fuller*, 788 P.2d 741 (Colo. 1990).

In determining whether an error was harmless beyond a reasonable doubt, a reviewing court should consider factors including: The importance of witness' testimony to the prosecution's case; whether the testimony is cumulative; the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony; the extent of the cross-examination otherwise permitted; and the overall strength of the prosecution's case. *Merritt v. People*, 842 P.2d 162 (Colo. 1992); *People v. Barnum*, 23 P.3d 1237 (Colo. App. 2001), *aff'd* by operation of law, 53 P.3d 646 (Colo. 2002); *People v. Harris*, 43 P.3d 221 (Colo. 2002).

Considering the independent evidence linking the defendant to the crime, the persuasive corroborative evidence substantiating the victim's account of the assault, and the lack of importance of the hearsay statements to the prosecution's case, the impact these inadmissible statements had on the jury was insignificant, and this error appears to be "so unimportant and insignificant" that it is to be deemed harmless since the admission of the hearsay statements did not contribute to the defendant's guilty verdict. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

Trial court committed no reversible error in admitting the transcribed testimony of three police officers in retrial of defendant whose previous conviction was overturned because defendant did not waive his right to be present during trial conducted in his absence. The officers did not present identification testimony, their testimony was cumulative and corroborative of eyewitness testimony concerning line-up procedures and the preparation of a composite drawing, and eyewitness testimony was over-

whelming evidence of guilt. *People v. Campbell*, 885 P.2d 327 (Colo. App. 1994).

No per se rule that out-of-court inculpatory statements made by complicitors in custody are inadmissible against criminal defendants, but rather the court should have applied the two-part test established in *Ohio v. Roberts*, 448 U.S. 56 (1980) on a case by case basis. *People v. Drake*, 785 P.2d 1253 (Colo. 1989).

If an out-of-court inculpatory statement inculcates a person other than the declarant, it must also be demonstrated, by a preponderance of the evidence, that attendant circumstances confirm the statement's trustworthiness. *People v. Newton*, 940 P.2d 1065 (Colo. App. 1996), *aff'd*, 966 P.2d 563 (Colo. 1998).

The hearsay exception for declarations against interest by an unavailable witness is not well-established; however, while a confession by a hired hit man was not admissible on this ground against the defendant who hired him, it was admissible because, considering the totality of the circumstances, it contained adequate guarantees of trustworthiness since it was genuinely self-inculpatory and was not coerced or motivated by expectations of leniency. *Stevens v. People*, 29 P.3d 305 (Colo. 2001) (applying *Lilly v. Virginia*, 527 U.S. 116 (1999) and *Ohio v. Roberts*, 448 U.S. 56 (1980)).

When a statement is offered to exculpate an accused under (b)(3), the court must first determine whether the statement complies with the rule and secondly must determine whether the admission of the statement violates the defendant's right to confrontation. In determining whether the statement complies with the rule, the people must show by a preponderance of the evidence that corroborating circumstances demonstrate the trustworthiness of the statement. *People v. Newton*, 966 P.2d 563 (Colo. 1998).

When admissible the trial court should admit all statements related to the precise statement against penal interest subject to two limits: Statements that are so self-serving as to be unreliable and statements made to curry favorable treatment should be excluded. *People v. Newton*, 966 P.2d 563 (Colo. 1998).

When a statement is offered to inculcate an accused under section (b)(3), three elements must be satisfied. First, the witness must be unavailable; second, the statement must tend to subject the declarant to criminal liability; and, third, the people must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement. In assessing the third criteria, the court should limit its inquiry to the circumstances surrounding the making of the statement and not rely on other independent evidence. Appropriate factors for the court to consider are: Where and when the statement was made; to whom the statement was made; what prompted the statement; how the statement was

made; what the statement contained; the nature and character of the statement; the relationship between the parties to the statement; the declarant's probable motivations for making the statement; and the circumstances under which the statement was made. The most important determination is whether the statement is genuinely self-inculpatory or whether it shifts the blame to the defendant. *Bernal v. People*, 44 P.3d 184 (Colo. 2002).

There is a three-part test to determine whether a statement inculcating a defendant may be admitted under (b)(3) and will satisfy the Colorado and United States Constitutions: (1) The witness must be unavailable; (2) the statement must tend to subject the declarant to criminal liability and be of a kind that a reasonable person in the declarant's position would not have made unless the person believed it to be true; and (3) corroborating circumstances at the time the statement was made must demonstrate the trustworthiness of the statement. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

In the third part of the test, the court should consider when and where the statement was made, what prompted the statement, how the statement was made, and the substance of the statement. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

Statements against penal interest made by a codefendant to an accomplice are admissible where the accomplice testifies about such statements in court and is subject to cross-examination, and whose own credibility was a question for the jury to determine. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

Child victims were found medically unavailable to testify at sexual abuse trial; therefore, videotapes of their depositions were admitted pursuant to § 18-3-413 (4). *Thomas v. Guenther*, 754 F. Supp. 833 (D. Colo. 1990).

Both § 13-25-129 and this rule are residuary rules and apply only if hearsay is not otherwise admissible under other hearsay exceptions. Section 13-25-129 is the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

Defendant's right to cross-examination at trial was not violated where, although defendant could not cross-examine the witness at trial because the witness died shortly after direct examination, the witness' deposition, at which he was cross-examined by the defendant, was read into the trial record and the direct examination did not raise any issues which were not covered in the deposition. *Van Schaack v. Van Schaack Holdings, Ltd.*, 856 P.2d 15 (Colo. App. 1992).

It is neither appropriate nor necessary for the attorney making the objection to hearsay to identify and describe every hearsay exception

and to argue against their applicability. The proponent of the hearsay statements has the burden to establish the foundation for admitting the statements under an exception to the hearsay rule. *Blecha v. People*, 962 P.2d 931 (Colo. 1998).

Applied in *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983); *People v. Raffaelli*, 701 P.2d 881 (Colo. App. 1985); *People v. Buhrl*, 744 P.2d 747 (Colo. 1987); *People v. Chambers*, 749 P.2d 984 (Colo. App. 1987).

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evi-

dence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801 (d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Attacking the Credibility of a Non-testifying Hearsay Declarant", see 29 Colo. Law. 51 (March 2000).

General rule, prior to adoption of this rule, was that inconsistent statements used to impeach a witness were not admissible unless the witness had been asked about the time and place and to whom the statement was made. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Trial court properly concluded that this rule allowed the prosecution to impeach defendant with evidence of his prior felony convictions, even though the defendant did not testify. Where defendant does not testify at trial, but he or she elicits his or her own hearsay statements through another witness, this rule

authorizes the jury to hear impeachment evidence that would have been admissible if the defendant had testified. Prior felony convictions are admissible for this purpose. *People v. Dore*, 997 P.2d 1214 (Colo. App. 1999).

This rule creates a specific exception to the foundational requirements of C.R.E. 613. Thus, where a transcript of a witness' testimony at the first trial was admitted into evidence at the second trial, testimony of a police detective as to inconsistent statements made by the witness were admissible without the witness first having opportunity to explain the prior inconsistent statements. *People v. Ball*, 821 P.2d 905 (Colo. App. 1991).

Prosecution's reliance on this rule for use of testimony regarding defendant's silence was misplaced. *People v. Welsh*, 80 P.3d 296 (Colo. 2003).

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence

which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Source: Entire rule amended and adopted November 25, 1998, effective January 1, 1999.

Editor's note: This rule was relocated from Rule 803(24) and Rule 804(b)(5).

ANNOTATION

Law reviews. For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002).

To admit evidence under the residual hearsay exception, the court must determine that the statement is more probative on the points it is offered for than any other evidence the proponent could procure through reasonable efforts. Through reasonable efforts the prosecution could have obtained more probative evidence, so the court's admission of the documents under the residual exception was improper. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

In considering the trustworthiness of statements to determine if they should be admissible under this rule, courts should examine the nature and character of the statements, the relationship of the parties, the probable motivation of the declarant in making the statements, and the circumstances under which the statements were made. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

The reliability of a statement should be determined by the circumstances that existed at the time the statement was made. Corroborating evidence is not an appropriate "circumstantial guarantee" supporting a hearsay statement. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007).

Court did not abuse its discretion when it concluded that unavailable witness's testimony lacked sufficient circumstantial guarantees of trustworthiness and refused to admit the transcript of the witness's police interview. The witness could not clearly recall the basic and crucial fact of the date and time that an alternative suspect was at another location. *People v. Sandoval-Candelaria*, ___ P.3d ___ (Colo. App. 2011).

Trial court did not abuse its discretion when it refused to admit an emissions test report under the residual hearsay exception. The court found the vehicle identification number on the emissions test report and the testimony of a Colorado motor vehicles division

emissions section employee verifying that the document was an emissions test report an insufficient guarantee of trustworthiness since the defendant did not present evidence of who conducted the test, whether the test was performed accurately, and whether the test was actually conducted on the car sold to the victim. *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

Trial court properly admitted nonverbal statement of deceased victim where: (1) Victim had no motivation to lie; (2) victim was capable of understanding and responding to questions; (3) victim's perception and identification of perpetrator were not in question; and (4) the utility of cross-examination was remote. *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

Trial court properly admitted identification statement by victim under the residual hearsay exception. The trial court determined in a pretrial hearing that, based on the circumstances of the statement, there was no substantial probability that the identification was unreliable. *Pena v. People*, 173 P.3d 1107 (Colo. 2007).

Trial court improperly admitted preliminary hearing testimony of deceased witness at trial because preliminary hearing testimony does not possess requisite trustworthiness. *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

A preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the confrontation clause requirements. Consequently, the use of a preliminary hearing transcript at trial is improper. *People v. Fry*, 92 P.3d 970 (Colo. 2004).

Trial court did not abuse its discretion by excluding testimony of defendant's sister because there were not sufficient guarantees of trustworthiness. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Evidence of plaintiff's past cocaine use not admissible in medical malpractice case. Statements regarding plaintiff's past cocaine use

were insufficiently trustworthy to be admissible under this rule where they did not concern cocaine use around the time of the alleged malpractice, were disputed and prejudicial, and were not more probative than other available evidence. Defendant could have tried to confirm

present cocaine use by plaintiff with testing and should not benefit from the admission of disputed and prejudicial evidence of past cocaine use because defendant failed to do so. *Haralampopoulos v. Kelly*, __ P.3d __ (Colo. App. 2011).

ARTICLE IX AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(Federal Rule Identical.)

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Non-expert opinion on handwriting.** Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(Federal Rule Identical.)

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Colorado Rules of Procedure, or by statute of the State of Colorado.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evi-

dence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Authentication of Pri-

vate Documents By Nonexpert Witnesses", see 22 Colo. 2241 (1993). For article, "Authentication", see 25 Colo. Law. 55 (September 1996).

Taped telephone call by the defendant in which he identified himself to a detective was properly admitted under this rule and the court correctly determined that the recorded call was not included in prosecution's stipulation that it did not intend to introduce any statements by the defendant. *People v. Czemyrnski*, 786 P.2d 1100 (Colo. 1990).

Mere fact that a document is authentic does not mean the document is admissible as competent evidence if the document constitutes otherwise inadmissible hearsay. *People v. Morise*, 859 P.2d 247 (Colo. App. 1993).

Trial court abused its discretion in allowing expert's testimony respecting the results of her tests because the items tested by the expert were not introduced and because the expert did not describe how the items she tested were marked. Thus there was no proper evidence establishing that the tested items came from either defendant or the victim, save for the expert's unexplained conclusory statements. *People v. Valencia*, 257 P.3d 1203 (Colo. App. 2011).

This rule merely establishes the requirements for admitting an item of physical evidence. However, even if the item itself is not admissible under this rule, the proponent may use other methods of proof to identify the item. *People ex rel. J.G.*, 97 P.3d 300 (Colo. App. 2004).

Testimony identifying items sufficient for admission. Testimony by the investigating officer identifying items seized at the scene of a crime is sufficient basis to support the admission of such items into evidence, even if the officer did not initial or mark the item when it was seized, if at trial the officer identifies the exhibit as appearing to be the same, or to look like, the evidence found at the scene. *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981).

Physical evidence is authenticated if evidence supports a finding the item is what its proponent claims. This can be satisfied by testimony the evidence is what it is claimed to be. *People v. Grace*, 55 P.3d 165 (Colo. App. 2001).

If a reasonable jury could decide that physical evidence is what its proponent claims it to be, trial court should allow the evidence to be presented to the jury. Any question as to the authenticity of the evidence is properly decided by the jury. *People v. Crespi*, 155 P.3d 570 (Colo. App. 2006).

Satisfaction of authentication or identification as condition precedent to admissibility satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Testimony of a witness with

knowledge that a matter is what it is claimed to be conforms to the requirements of this rule. *People v. Esch*, 786 P.2d 462 (Colo. App. 1989); *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Authentication was satisfied when prosecution stated that it intended to use video animation to show the types of injuries generated by shaking a baby and that, because prosecution's expert would testify regarding the types of injuries discussed in the video, such video would assist the jury. *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001).

Record of defendant's conviction of forgery maintained by the Kansas bureau of investigation was admissible as a public record under section (b)(7). *People v. Deskins*, 904 P.2d 1358 (Colo. App. 1995), *aff'd in part and rev'd in part* on other grounds, 927 P.2d 368 (Colo. 1996).

Sheriff's office booking reports containing certification and signature of custodian of records were admissible as public records under subsection (b)(7). *People v. Warrick*, ___ P.3d ___ (Colo. App. 2011).

Although subsection (b)(9) may be used to authenticate computer records, there is no requirement that computer records be authenticated only in this way. *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002).

Administrative law judge (ALJ) did not abuse his discretion by admitting documentary evidence under subsection (b)(1). Based upon witness testimony, ALJ committed no abuse of discretion in admitting record of request for purchase of political time and an agreement form for non-candidate issue advertisements as having been sufficiently authenticated under subsection (b)(1). As to admissibility of affidavit of performance used to indicate dates, airtimes, and the district in which the advertisements were broadcast, ALJ correctly held that political committee's agent would not have authorized payment of invoices if he doubted advertisements aired during relevant time period and in relevant legislative district. There was no need to further authenticate affidavit of performance because agent's conduct manifested "belief in its truth" under C.R.E. 801(d)(2)(B). Collectively, these documents support ALJ's findings that during relevant time period political committee arranged to broadcast television advertisements opposing legislative candidate to voters in candidate's district. *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207 (Colo. App. 2008).

Applied in *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd in part and rev'd in part* on other grounds, 749 P.2d 952 (Colo. 1988); *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(Federal Rule Identical.)

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(Federal Rule Identical.)

(3) **Foreign public documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(Federal Rule Identical.)

(4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Federal or Colorado Rule of Procedure, or with any Act of the United States Congress, or any statute of the State of Colorado.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(Federal Rule Identical.)

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

(Federal Rule Identical.)

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(Federal Rule Identical.)

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(Federal Rule Identical.)

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law. (*Federal Rule Identical.*)

(10) **Presumptions under legislative Act.** Any signature, document, or other matter declared by Act of the Congress of the United States, or by any statute of the State of Colorado to be presumptively or *prima facie* genuine or authentic.

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person, in a manner complying with any Colorado statute or rule prescribed by the Colorado Supreme Court, certifying that the record—

(a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(b) was kept in the course of the regularly conducted activity; and

(c) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and affidavit available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(b) was kept in the course of the regularly conducted activity; and

(c) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Source: (11) and (12) added and adopted June 20, 2002, effective July 1, 2002.

ANNOTATION

Law reviews. For article, “Authentication”, see 25 Colo. Law. 55 (September 1996).

Out-of-state affidavit acknowledged by notary. An out-of-state affidavit of indigency, once sworn before and acknowledged by a notary, requires no further evidence of authenticity as a condition precedent to its admissibility. *Otani v. District Court*, 662 P.2d 1088 (Colo. 1983).

An administrative rule that does not satisfy the public notice requirements of § 24-4-103, C.R.S. may not be introduced as evidence in criminal proceedings. *People v. More*, 668 P.2d 968 (Colo. App. 1983).

Certified copies of public records provide sufficient authentication for purposes of proof under the habitual criminal statute. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

This rule does not require that each and every signature contained within an otherwise properly authenticated set of public documents be certified or embossed with a seal. *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), *aff'd in part and rev'd in part* on other grounds, 69 P.3d 1029 (Colo. 2003).

Promissory note is self-authenticating when produced in a suit to collect deficiency and constitutes *prima facie* evidence of nonpayment unless the defendant establishes a defense. *Smith v. Weindrop*, 833 P.2d 856 (Colo. App. 1992).

Certification in accordance with this rule makes the document self-authenticating and eliminates the need that a copy of the record be authenticated by testimony. *People v. Vasquez*, 155 P.3d 588 (Colo. App. 2006).

Interrogatory response and report of subcontractor's employee on city's ventilation

system in city's action against contractor and subcontractor was self-authenticating and required no further evidence of authenticity as a condition precedent to its admissibility. Interrogatory response was a document accompanied by certificate of acknowledgment executed as provided by law by notary public or other officer authorized to take acknowledgments. *City of Westminster v. MOA, Inc.*, 867 P.2d 137 (Colo. App. 1993).

Record of defendant's conviction of forgery maintained by the Kansas bureau of in-

vestigation that bore the state seal was not self-authenticating because it did not contain a signature purporting to be an attestation or execution as required by subsection (1). *People v. Deskins*, 904 P.2d 1358 (Colo. App. 1995), *aff'd* in part and *rev'd* in part on other grounds, 927 P.2d 368 (Colo. 1996).

Applied in *People v. Wiedemer*, 641 P.2d 289 (Colo. App. 1981); *People v. Jenkins*, 717 P.2d 994 (Colo. App. 1985).

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.
(*Federal Rule Identical.*)

COMMITTEE COMMENT

The Committee finds that the Federal rules in this area are for the most part an accurate representation of Colorado case law, statutes, and the Rules of Procedure. The Committee opinion is that the rules as adopted provide a more flexible guide to evidentiary problems relating

to authentication and identification and thereby avoid the necessity of the search for a "case in point." The rules would cover a number of cases and situations arising in trial, not currently reported in case law.

ARTICLE X CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(*Federal Rule Identical.*)

Cross references: For the uniform law on photographic records, see article 26 of title 13, C.R.S.

ANNOTATION

Law reviews. For article, "Admissibility of Imaging Systems", see 25 Colo. Law. 61 (September 1996).

Accurate transcriptions of sound recordings are admissible to assist the jury in following the recordings while they are played. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Ordinarily, photographs are admissible to depict graphically anything a witness may describe in words, provided that the prejudicial effect of the photographs does not far outweigh their probative value. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

Photographs may be introduced to show any matter which a witness could describe in words, including the appearance of the victim. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

Trial court has broad discretion in determining the admissibility of photographs. *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981).

Court's ruling not disturbed, absent abuse. Unless an abuse of discretion is shown, the trial court's ruling on the admissibility of photographs into evidence will not be disturbed on review. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

Trial judge to weigh inflammatory effect of photographs against value. When photographs are determined to have probative value, the trial judge's task is to determine whether their potential inflammatory effect far outweighs that value. The trial judge's determination will not be disturbed on review absent an abuse of discretion. *People v. Dillon*, 633 P.2d 504 (Colo. App. 1981); *People v. Loscutt*, 661 P.2d 274 (Colo. 1983).

The admissibility of photographs into evidence in a homicide prosecution is a matter

within the discretion of a trial judge, who must weigh the probative value against the potential inflammatory effect on the jury. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Dillon*, 633 P.2d 504 (Colo. App. 1981).

It is within the trial court's discretion to decide whether photographs are unnecessarily gruesome or inflammatory, and the court's decision will be reversed only upon abuse of that discretion. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

Photographs are not inadmissible merely because they reveal shocking details of a crime. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

Cumulative effect of photographs held not to incite the jurors to passion or prejudice. *People v. Scherrer*, 670 P.2d 18 (Colo. App. 1983).

Photocopies constitute duplicates. *Fasso v. Straten*, 640 P.2d 272 (Colo. App. 1982).

Carbon copies are duplicate originals. *Equico Lessors, Inc. v. Tak's Automotive Serv.*, 680 P.2d 854 (Colo. App. 1984).

Photographs may be introduced which graphically portray the scene of the crime, appearance of the victim, and other facts which are competent for a witness to describe in words. In determining which photographs should be admitted, the trial court must exercise its discretion and weight the probative value of the evidence against its inflammatory effect. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

Applied in *People v. Weese*, 753 P.2d 778 (Colo. App. 1987).

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute of the State of Colorado or of the United States.

ANNOTATION

Where disputed evidence is both a chattel and a writing, trial court has wide discretion in determining whether to require production of the original. In exercising this discretion, the trial court should consider the complexity of the writing, the danger of mistransmission of its contents, the difficulty of producing the original, and whether a bona fide dispute exists as to its contents. *People v. Wortham*, 690 P.2d 876 (Colo. App. 1984).

Summary evidence admissible under CRE 1006 is not objectionable on the ground that it violates the best evidence rule. If proper

foundation has been established, questions concerning the authenticity of the evidence or the credibility of the testimony go to the weight of the evidence, not its admissibility. *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086 (Colo. App. 1992).

Where original videotape was admitted, the videotape constituted best evidence and it was not plain error to allow further testimony regarding the contents of the videotape. *People v. Robinson*, 908 P.2d 1152 (Colo. App. 1995), *aff'd* on other grounds, 927 P.2d 381 (Colo. 1996).

Applied in *People v. Williams*, 654 P.2d 319 (Colo. App. 1982).

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(Federal Rule Identical.)

COMMITTEE COMMENT

The Committee notes the desirability of requiring, in pretrial procedures, that any genuine questions as to the authenticity of the original, or of circumstances that it would be unfair to

admit the duplicate, be raised, so that the offering party may take appropriate steps under Rule 1004 to obtain the original.

ANNOTATION

Law reviews. For article, "Admissibility of Imaging Systems", see 25 Colo. Law. 61 (September 1996). For article, "The Admissibility of Secondary Evidence: C.R.E. 1003 and 1004", see 31 Colo. Law. 77 (May 2002).

Duplicates admitted in lieu of originals. Where the defendants were in possession of the copies for more than eight months prior to the trial and knew at that time that the originals were in the hands of third parties, it was proper for the court to admit the duplicates in lieu of the originals. *Fasso v. Straten*, 640 P.2d 272 (Colo. App. 1982).

When altered duplicates admissible. If alterations in the duplicates and/or the originals of otherwise admissible documents have been made, such documents are still admissible provided a full and satisfactory explanation of such alterations is made prior to their admission. *People v. Wolfe*, 662 P.2d 502 (Colo. App. 1983).

If the content of a videotape has not been altered, playing the tape at real-time speed,

or in an enhanced or enlarged form that does not alter the original images, is generally permissible. *People v. Armijo*, 179 P.3d 134 (Colo. App. 2007).

Where there is no evidence of a discrepancy between the original and the duplicate, the unsupported supposition that the original may have been altered will not prevent introduction of the duplicate. *Equico Lessors, Inc. v. Tak's Automotive Serv.*, 680 P.2d 854 (Colo. App. 1984).

Where defendant did not object to use of photocopy, its use did not so undermine the fundamental fairness of trial as to cast serious doubt on the reliability of conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

While this rule and C.R.E. 1004 may allow for admission of a duplicate will into evidence in lieu of the original, in the case of a lost or missing will, the standards specified in §15-12-402 will control whether the will can be admitted to probate. *In re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(Federal Rule Identical.)

COMMITTEE COMMENT

Subparagraph (1) of the rule will be in lieu of Rule 43(g)(1) of the Colorado Rules of Civil Procedure; subparagraph (2) will be in lieu of Rule 43(g)(6); subparagraph (3) will be in lieu of Rule 43(g)(2). With respect to subparagraph (2), the adoption of this provision has a direct correlation with the comments appended to Rule 1003 regarding pretrial procedure. The Committee suggests that subparagraph (2) be viewed in terms of available judicial process or

procedure that is reasonable in the circumstances considering time and expense. For example, the FRE Committee's Advisory Notes refer to procedure including subpoena *duces tecum* as an incident to the taking of a deposition in another jurisdiction. Such time and expense would often appear to be unjustified, and should in part be taken care of by the pretrial procedures recommended in comments under Rule 1003.

ANNOTATION

Law reviews. For article, "The Admissibility of Secondary Evidence: C.R.E. 1003 and 1004", see 31 Colo. Law. 77 (May 2002).

This rule provides that the original of a written document is not required, and other evidence of its contents is admissible if the originals have been lost or destroyed, unless the proponent lost or destroyed them in bad faith; therefore, when the proponent cannot produce the original of a written document, because of its loss or destruction, the trial court should admit secondary evidence. *Rodriguez v. Schutt*, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

This rule requires exclusion of evidence only when the proponent's bad faith causes the loss or destruction of the original document. The proponent must prove, to the satisfaction of the court, the absence of bad faith. *Rodriguez v. Schutt*, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

In the event the original of a document is lost, destroyed or is not obtainable, or is in the possession of the opponent, other evidence of the contents of the writing is admissible. *Decker*

v. Browning-Ferris Indus. of Colorado, Inc., 903 P.2d 1150 (Colo. App. 1995); *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998).

Same rationale for admissibility or exclusion of evidence under this rule applies to evidence other than written documents. *Rodriguez v. Schutt*, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

Court erred in not applying the exception in subsection (1) to allow evidence of indemnification contract, allegedly lost or destroyed, and such error constituted clear evidence of mistake amounting to error of law. *United Cable Television of Jeffco, Inc. v. Montgomery LC, Inc.*, 942 P.2d 1230 (Colo. App. 1996).

While this rule and C.R.E. 1003 may allow for admission of a duplicate will into evidence in lieu of the original, in the case of a lost or missing will, the standards specified in §15-12-402 will control whether the will can be admitted to probate. *In re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

Applied in *People v. Banks*, 655 P.2d 1384 (Colo. App. 1982), aff'd, 696 P.2d 293 (Colo. 1985).

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded, or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Federal Rule Identical.)

COMMITTEE COMMENT

This provision is in lieu of Rule 43(g)(3) of the Colorado Rules of Civil Procedure. The Committee does not recommend any changes in the language, but this is based upon the assumption

that Rule 902 would be amended to provide for certification in accordance with Colorado statute.

ANNOTATION

Certified copies of public records provide sufficient authentication for purposes of proof under the habitual criminal statute. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984).

Testimony of expert. Any question concerning the expert's ability to make a dependable comparison from photocopies goes to weight to be given his testimony rather than to the admis-

sibility of the copies. *People v. Weese*, 753 P.2d 778 (Colo. App. 1987).

Certification in accordance with C.R.E. 902 makes the document self-authenticating and eliminates the need that a copy of the record be authenticated by testimony. *People v. Vasquez*, 155 P.3d 588 (Colo. App. 2006).

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule will replace Rule 43(g)(5) of the Colorado Rules of Civil Procedure.

ANNOTATION

Law reviews. For article, "Summaries as Evidence", see 16 Colo. Law. 1836 (1987). For article, "Rule 1006: Admissibility of Summary Evidence", see 22 Colo. Law. 35 (1993).

Failure by a party to seek discovery of underlying materials does not affect his right to examine and inspect the documents or records from which the summary is prepared. *International Tech. Instruments v. Eng'g Measurements, Inc.*, 678 P.2d 558 (Colo. App. 1983); *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

This rule does not require that the records be delivered to the opposing party, provided the records are made available at a reasonable time and place. *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

Prosecution's use of summary records pursuant to this rule requires the prosecution to be responsible for the cost of redacting confidential information in the underlying voluminous records so that the records can be available for examination and copying by the defendant. *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

Summary evidence does not violate "best evidence" rule. *Metro Nat. Bank v. Parker*, 773 P.2d 633 (Colo. App. 1989); *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086 (Colo. App. 1992).

Evidence admissible under this rule not objectionable on ground that it violates the "best evidence rule." If proper foundation has

been established, questions concerning the authenticity of the evidence or the credibility of the testimony go to the weight of the evidence, not the admissibility. *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086 (Colo. App. 1992).

Rule requires prosecution to be responsible for redacting patient names so underlying hospital records could be available for examination and copying by the defendant. Here, prosecution did not cause redaction to be done so records could be examined by defendant. Accordingly, trial court erred in placing that burden on the defendant. *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

By permitting the admission of summaries into evidence, rule relieves the proponent of voluminous evidence from the burden of introducing each part of the voluminous record. However, in order to utilize this rule, the proponent must provide the opposing party an opportunity to examine the records from which the summaries were taken. If the content of records is such that an opposing party cannot examine them, the records cannot be said to be available. Therefore, if the records can be examined only after redaction of certain portions, then the proponent must be responsible for that process. This is part of the proponent's burden of making the records available to the opposing party. *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).

Applied in *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086 (Colo. App. 1992).

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

(Federal Rule Identical.)

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Federal Rule Identical.)

**ARTICLE XI
MISCELLANEOUS RULES****Rule 1101. Applicability of Rules**

(a) **Courts.** These rules apply to all courts in the State of Colorado.

(b) **Proceedings generally.** These rules apply generally to civil actions, to criminal proceedings, and to contempt proceedings, except those in which the court may act summarily.

(c) **Rule of privilege.** The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(Federal Rule Identical.)

(d) **Rules inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:

(1) **Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) **Grand jury.** Proceedings before grand juries.

(3) **Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(Federal Rule Identical.)

(e) **Rules applicable in part.** In any special statutory proceedings, these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein.

Editor's note: The Colorado Rules of Evidence do not apply to hearings under the Colorado Rules for Traffic Infractions. See Rule 11, C.R.T.I.

COMMITTEE COMMENT

The Colorado rule is culled from Rule 81 of the Colorado Rules of Civil Procedure and Rule 1101(e) of the Federal Rules of Evidence.

ANNOTATION

Grand jury or preliminary hearing. Hearsay, and other evidence which would be incompetent if offered at trial, is admissible and may well be the bulk of evidence offered to the grand jury or at the preliminary hearing. *People*

v. Gable, 647 P.2d 246 (Colo. App. 1982); *People v. Buhrle*, 744 P.2d 747 (Colo. 1987).
Applied in *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981); *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

Rule 1102. (No Colorado Rule Codified)

Rule 1103. Title

These rules shall be known and cited as the Colorado Rules of Evidence, or CRE,

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CHAPTER 34

**The Colorado Rules
for Reapportionment
Commission Proceedings**

Adopted by the
SUPREME COURT OF COLORADO

Effective October 22, 1981

THE HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1800

BY
JOHN H. COLEMAN
OF THE
BOSTON PUBLIC LIBRARY

CHAPTER 34

RULES FOR REAPPORTIONMENT COMMISSION PROCEEDINGS

1. These rules are adopted by the Supreme Court of Colorado pursuant to Article V, Section 48(1)(e) of the Colorado Constitution and apply to the revision and alteration of legislative districts after the federal census of 2010.

2. Upon submission of the Reapportionment Commission's plan for reapportionment of the members of the General Assembly to the Supreme Court, the review and determination of the plan's compliance with the requirements of Article V, Sections 46 and 47 of the Colorado Constitution shall take precedence over all regular docket matters before the Court.

3. No later than October 7, 2011, the Commission shall file the plan with the Court. The plan shall include a comprehensive map or maps of the proposed senatorial and representative districts, together with any statements describing the proposed plan and its implementation.

4. On or before ten (10) days following the Commission's filing of the plan to the Court, the Commission, and any other proponent of the submitted plan, shall file with the Court appropriate explanatory materials and legal memoranda in support of the plan.

5. Any opponent to the plan filed by the Commission may file a statement of opposition, a proposed alternate plan or plans, appropriate maps, and comprehensive explanatory, descriptive, and legal memoranda. Such materials shall be filed with the Court on or before 20 calendar days following the Commission's filing of the plan to the Court.

6. The Commission and any proponent shall have up to and including five (5) calendar days from the filing of any statement of opposition, to file with the Court a reply to such statement of opposition, if the Commission or proponent so desires.

7. The Court may request supplementary materials or legal memoranda from the Commission or any party appearing before the Court in this matter to be furnished within ten (10) days of the request.

8. The Court may require oral argument upon any issue raised by the Commission, other proponents, or opponents. Notice of the time and date of any oral argument and the procedures to be followed shall be mailed to the Commission and other parties.

9. The final submission of legal arguments or evidence concerning the plan shall be filed no later than November 9, 2011.

10. The Court may approve the plan without giving written reasons for such approval, but the Court shall give its reasons in writing for disapproval of the plan. If the plan is returned to the Commission, the Court shall specify to the Commission the time period in which the Commission shall revise and modify the plan to conform to the Court's requirements and to resubmit the plan to the Court. Petitions for rehearing must be filed within five (5) days of the announcement of any decision.

11. The Court shall approve a plan for the redrawing of the districts by a date that will allow sufficient time for such plan to be filed with the secretary of state but no later than December 14, 2011. The Court shall order that such plan be filed with secretary of state no later than such date.

12. An original and nine (9) copies of all materials and pleadings shall be filed with the Court. In addition, and where possible, an electronic version of all materials and pleadings shall be submitted to the Court in text searchable Portable Document Format (PDF), that exactly duplicates the appearance of the paper original, including the order and pagination of all the components.

13. All periods of time prescribed or allowed by this rule shall be computed in accordance with C.A.R. 26(a), except that intermediate Saturdays, Sundays and legal holidays shall be included in the computation. Regardless of the provisions of C.A.R. 25(a)

to the contrary, filing under this rule may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, with no exceptions.

14. The Court shall provide notice of all filings with the Court by posting such filings on the Colorado Judicial website: <http://www.courts.state.co.us/>

15. These rules are effective upon adoption.

Source: 1, 3, 4, and 5 amended and adopted June 21, 2001, effective July 1, 2001; entire chapter amended and effective June 2, 2011.

ANNOTATION

Role of supreme court in review proceeding is a narrow one: To measure the proposed reapportionment plan against the constitutional standards. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 191 (Colo. 1982); *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 209 (Colo. 1982).

Court's review proceeding is meant to be swift and limited in scope so that elections from the new districts may proceed on schedule. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 191 (Colo. 1982).

Choice among plans for commission, not court. The choice among alternative plans, each consistent with constitutional requirements, is for the reapportionment commission and not the supreme court. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 191 (Colo. 1982); *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 209 (Colo. 1982).

Political considerations may not outweigh constitutional criteria. Although reapportion-

ment is not without political considerations, these considerations are not among the constitutional criteria, and the commission may not allow them to outweigh the constitutional criteria. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 209 (Colo. 1982).

While it is not improper for the reapportionment commission to attempt to resolve political conflicts engendered by the supreme court's disapproval of the original plan, problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 209 (Colo. 1982).

Plan held unconstitutional. Where a reapportionment plan's districts are not as compact as possible, nor does the plan preserve communities of interest wherever possible, it violates the clear constitutional criteria of sections 47(1) and (3) of art. V, Colo. Const. *In re Reapportionment of Colo. Gen. Ass'y*, 647 P.2d 209 (Colo. 1982).

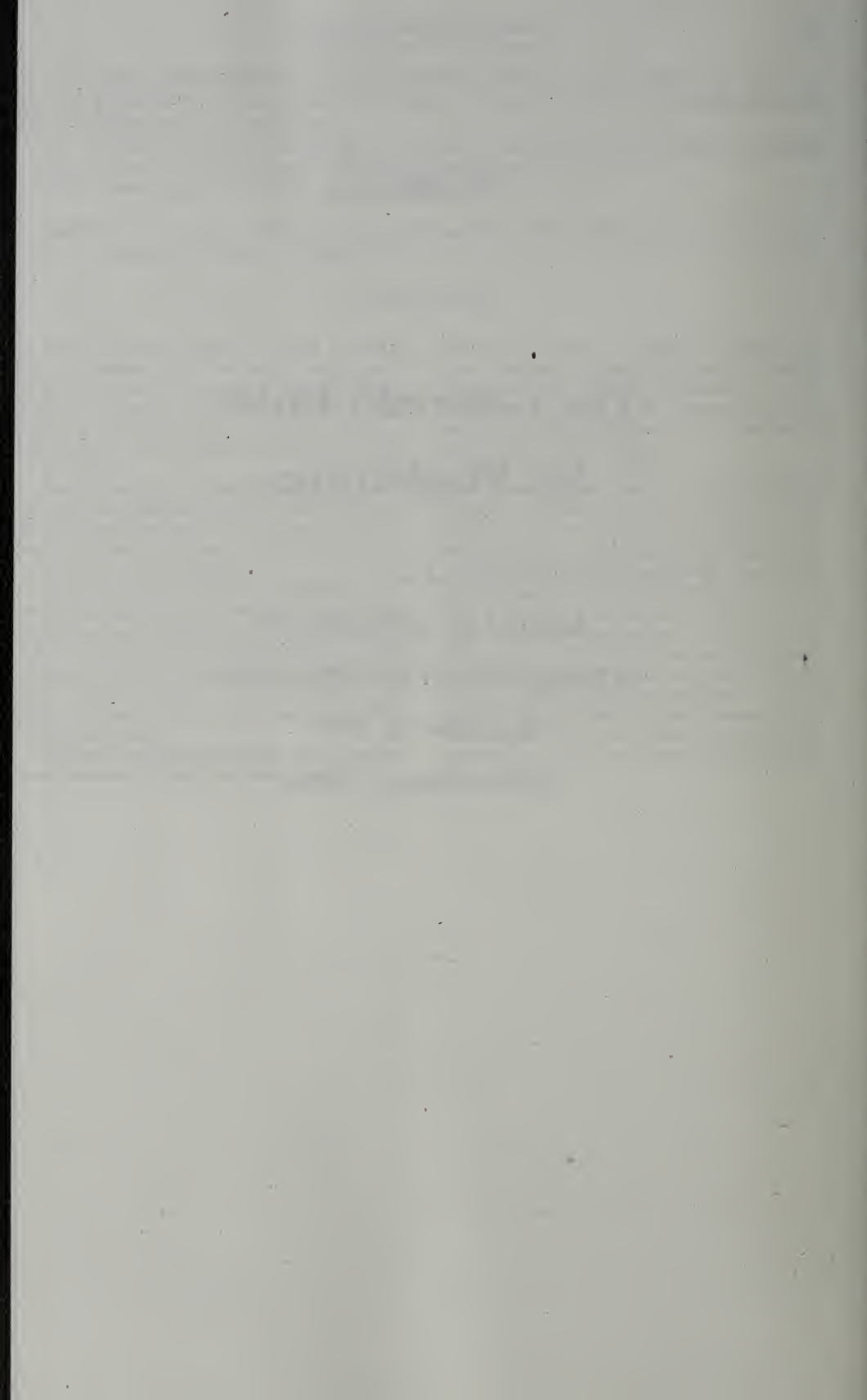
CHAPTER 35

**The Colorado Rules
for Magistrates**

**Amended and Adopted by the
SUPREME COURT OF COLORADO**

September 30, 1999,

Effective January 1, 2000



ANALYSIS BY RULE

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CHAPTER 35

COLORADO RULES FOR MAGISTRATES

Editor's note: Amendments made to the Colorado Rules for Referees, effective January 1, 1989, resulted in renumbering and retitling for rules 4 through 12. Amendments to these rules, effective September 12, 1991, resulted in retitling of chapter and retitling of rules 5 through 10 and rule 13.

Rule 1. Scope and Purpose

These rules are designed to govern the selection, assignment and conduct of magistrates in civil and criminal proceedings in the Colorado court system. Although magistrates may perform functions which judges also perform, a magistrate at all times is subject to the direction and supervision of the chief judge or presiding judge.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

ANNOTATION

Magistrates exercise authority only at the discretion of the judges who appoint them. Therefore no impropriety in the provision of a court memorandum prohibiting magistrates

from conducting bond hearings. *Wiegand v. Larimer County Court Magistrate*, 937 P.2d 880 (Colo. App. 1996).

Rule 2. Application

These rules apply to all proceedings conducted by magistrates in district courts, county courts, small claims courts, Denver Juvenile Court and Denver Probate Court, as authorized by law, except for proceedings conducted by water referees, as defined in Title 37, Article 92, C.R.S., and proceedings conducted by masters governed by C.R.C.P. 53.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

ANNOTATION

When magistrates act in probate matters. The powers of magistrates and appellate review of their orders are governed, in the first instance, by these rules. When magistrates are acting in probate matters, their powers are additionally controlled by the Colorado Rules of Probate Procedure. *Estate of Jordan v. Estate of Jordan*, 899 P.2d 350 (Colo. App. 1995).

When magistrates act in juvenile matters. The procedural powers of a juvenile court after reviewing a juvenile magistrate's findings are governed by these rules and by relevant provisions of the Children's Code. *People in Interest of R.A.*, 937 P.2d 731 (Colo. 1997).

Rule 3. Definitions

The following definitions shall apply:

(a) **Magistrate:** Any person other than a judge authorized by statute or by these rules to enter orders or judgments in judicial proceedings.

(b) **Chief Judge:** The chief judge of a judicial district.

(c) **Presiding Judge:** The presiding judge of the Denver Juvenile Court, the Denver Probate Court, or the Denver County Court.

(d) **Reviewing Judge:** A judge designated by a chief judge or a presiding judge to review the orders or judgments of magistrates in proceedings to which the Rules for Magistrates apply.

(e) **Order or Judgment:** All rulings, decrees or other decisions of a judge or a magistrate made in the course of judicial proceedings.

(f) **Consent:**

(1) **Consent in District Court:**

(A) For the purposes of the rules, where consent is necessary a party is deemed to have consented to a proceeding before a magistrate if:

(i) The party has affirmatively consented in writing or on the record; or

(ii) The party has been provided notice of the referral, setting, or hearing of a proceeding before a magistrate and failed to file a written objection within 14 days of such notice; or

(iii) The party failed to appear at a proceeding after having been provided notice of that proceeding.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(2) **Consent in County Court:**

(A) When the exercise of authority by a magistrate in any proceeding is statutorily conditioned upon a waiver of a party pursuant to C.R.S. section 13-6-501, such waiver shall be executed in writing or given orally in open court by the party or the party's attorney of record, and shall state specifically that the party has waived the right to proceed before a judge and shall be filed with the court.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(3) **Consent in Small Claims Court:**

(A) A party will be deemed to accept the jurisdiction of the Small Claims Court unless the party objects pursuant to C.R.S. section 13-6-405 and C.R.C.P. 511(b).

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (a), (d), and (e) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005; (f)(1)(A)(ii) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 4. Qualifications, Appointment, Evaluation and Discipline

The following rules shall apply to all magistrates and proceedings before magistrates:

(a) To be appointed, a magistrate must be a licensed Colorado attorney with at least five years of experience, except in Class "C" or "D" counties the chief judge shall have the discretion to appoint a qualified licensed attorney with less than 5 years experience to perform all magistrate functions.

(b) All magistrates shall be attorneys-at-law licensed to practice law in the State of Colorado, except that in the following circumstances a magistrate need not be an attorney:

(1) A magistrate appointed to hear only Class A and Class B traffic infractions in a county court;

(2) A county court judge authorized to act as a magistrate in a small claims court;

(3) A county court judge authorized to act as a county court magistrate.

(c) All magistrates shall be appointed, evaluated, retained, discharged, and disciplined, if necessary, by the chief or presiding judge of the district, with the concurrence of the chief justice.

(d) Any person appointed pursuant to these rules as a district court, county court, probate court, juvenile court, or small claims court magistrate may, if qualified, and in the discretion of the chief or presiding judge, exercise any of the magistrate functions authorized by these rules.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

Rule 5. General Provisions

(a) An order or judgment of a magistrate in any judicial proceeding shall be effective upon the date of the order or judgment and shall remain in effect pending review by a reviewing judge unless stayed by the magistrate or by the reviewing judge. Except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has no authority to consider a petition for rehearing.

(b) A magistrate may issue citations for contempt, conduct contempt proceedings, and enter orders for contempt for conduct occurring either in the presence or out of the presence of the magistrate, in any civil or criminal matter, without consent. Any order of a magistrate finding a person in contempt shall upon request be reviewed in accordance with the procedures for review set forth in rule 7 or rule 9 herein.

(c) A magistrate shall have the power to issue bench warrants for the arrest of non-appearing persons, to set bonds in connection therewith, and to conduct bond forfeiture proceedings.

(d) A magistrate shall have the power to administer oaths and affirmations to witnesses and others concerning any matter, thing, process, or proceeding, which is pending, commenced, or to be commenced before the magistrate.

(e) A magistrate shall have the power to issue all writs and orders necessary for the exercise of their jurisdiction established by statute or rule, and as provided in section 13-1-115, C.R.S.

(f) No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.

(g) All magistrates in the performance of their duties shall conduct themselves in accord with the provisions of the Colorado Code of Judicial Conduct. Any complaint alleging that a magistrate, who is an attorney, has violated the provisions of the Colorado Code of Judicial Conduct may be filed with the Office of Attorney Regulation Counsel for proceedings pursuant to C.R.C.P. 251.1, et. seq. Such proceedings shall be conducted to determine whether any violation of the Code of Judicial Conduct has occurred and what discipline, if any, is appropriate. These proceedings shall in no way affect the supervision of the Chief Judge over magistrates as provided in C.R.M. 1.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (a) amended September 6, 1990, effective January 1, 1991; entire rule (including rule title) amended and effective September 12, 1991; (f) added and effective February 3, 1994; entire chapter amended September 30, 1999, effective January 1, 2000; (a)(3)(A) corrected and effective November 9, 1999; (g) added June 1, 2000, and corrected to (h) June 27, 2000, effective July 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005.

Rule 6. Functions of District Court Magistrates

(a) **Functions in Criminal Cases:** A district court magistrate may perform any or all of the following functions in criminal proceedings:

(1) No consent necessary:

(A) Conduct initial appearance proceedings, including advisement of rights, admission to bail, and imposition of conditions of release pending further proceedings.

- (B) Appoint attorneys for indigent defendants and approve attorney expense vouchers.
 - (C) Conduct bond review hearings.
 - (D) Conduct preliminary and dispositional hearings pursuant to C.R.S. sections 16-5-301(1) and 18-1-404(1).
 - (E) Schedule and conduct arraignments on indictments, informations, or complaints.
 - (F) Order presentence investigations.
 - (G) Set cases for disposition, trial, or sentencing before a district court judge.
 - (H) Issue arrest and search warrants, including nontestimonial identifications under Rule 41.1.
 - (I) Conduct probable cause hearings pursuant to C.R.S. sections 24-60-301 to -309, the Uniform Act for Out-of-State Parolee Supervision.
 - (J) Any other function authorized by statute or rule.
- (2) Consent necessary:
- (A) Enter pleas of guilty.
 - (B) Enter deferred prosecution and deferred sentence pleas.
 - (C) Modify the terms and conditions of probation or deferred prosecutions and deferred sentences.
 - (D) Impose stipulated sentences to probation in cases assigned to problem solving courts.
- (b) Functions in Matters Filed Pursuant to Colorado Revised Statutes Title 14 and Title 26:
- (1) No Consent Necessary
 - (A) A district court magistrate shall have the power to preside over all proceedings arising under Title 14, except as described in section 6(b)(2) of this Rule.
 - (B) A district court magistrate shall have the power to preside over all motions to modify permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities, except petitions to review as defined in C.R.M. 7.
 - (C) A district court magistrate shall have the power to determine an order concerning child support filed pursuant to Section 26-13-101 et. seq.
 - (D) Any other function authorized by statute.
 - (2) Consent Necessary: With the consent of the parties, a district court magistrate may preside over contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities.
- (c) Functions in Civil Cases: A district court magistrate may perform any or all of the following functions in civil proceedings:
- (1) No consent necessary
 - (A) Conduct settlement conferences.
 - (B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 55, and conduct post-judgment proceedings.
 - (C) Conduct hearings and enter orders authorizing sale, pursuant to C.R.C.P. 120.
 - (D) Conduct hearings as a master pursuant to C.R.C.P. 53.
 - (E) Hear and rule upon all motions relating to disclosure, discovery, and all C.R.C.P. 16 and 16.1 matters.
 - (F) Conduct proceedings involving protection orders pursuant to C.R.S. Section 13-14-101 et. seq.
 - (G) Any other function authorized by statute.
 - (2) Consent Necessary: A magistrate may perform any function in a civil case except that a magistrate may not preside over jury trials.
- (d) Functions in Juvenile Cases: A juvenile court magistrate shall have all of the powers and be subject to the limitations prescribed for juvenile court magistrates by the provisions of Title 19, Article 1, C.R.S. Unless otherwise set forth in Title 19, Article 1, C.R.S., consent in any juvenile matter shall be as set forth in CRM 3(f)(1).
- (e) Functions in Probate and Mental Health Cases:
- (1) No consent necessary:
 - (A) Perform any or all of the duties which may be delegated to or performed by a probate registrar, magistrate, or clerk, pursuant to C.R.P.P. 34 and C.R.P.P. 35.

(B) Hear and rule upon petitions for emergency protective orders and petitions for temporary orders.

(C) Any other function authorized by statute.

(2) Consent Necessary

(A) Hear and rule upon all matters filed pursuant to C.R.S. Title 15.

(B) Hear and rule upon all matters filed pursuant to C.R.S. Title 25 and Title 27.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (c)(1), (d)(2), and (d)(3) amended and (12) added September 6, 1990, effective January 1, 1991; (rule title), (a), IP(b), IP(c), IP(d), (d)(11), and (e) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; (6)(b) amended and adopted, effective November 6, 2003; entire rule amended and adopted May 12, 2005, effective July 1, 2005; (d) amended and effective January 11, 2007; (a)(2)(D) added and effective October 14, 2010.

ANNOTATION

Law reviews. For article, "Family Law Magistrates: An Overview of Review and Appeal Procedures", see 32 Colo. Law. 91 (September 2003).

For purposes of applying these rules, a motion filed in a dissolution of marriage case that seeks interpretation and clarification of a prior stipulation filed in the same case does not change the character of the action from a family law matter to a civil matter. *People ex rel. Garner v. Garner*, 33 P.3d 1239 (Colo. App. 2001).

Family law magistrate lacks jurisdiction to act on a motion regarding parenting time under the Uniform Dissolution of Marriage Act once decision-making responsibilities are at issue. *In re Ferris*, 75 P.3d 1170 (Colo. App. 2003).

Characterization of a common law marriage determination hinges on context in which the issue is raised. When the common law marriage issue is related to an effort to dissolve a marriage, it constitutes a "family law case", thereby implicating section (b) of this rule and § 13-5-301 (3). *In re Phelps*, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

Determination of the sequence of death is not a power that may be delegated by the probate court and exercised by a magistrate under subsection (d)(11). *Estate of Jordan v. Estate of Jordan*, 899 P.2d 350 (Colo. App. 1995).

Determination of the intent of the decedent is not a power that may be delegated by the probate court and exercised by a magistrate under subsection (d)(11). *In re Estate of Hillebrandt*, 979 P.2d 36 (Colo. App. 1999).

Section (c) of this rule allows a magistrate to conduct pre-trial discovery proceedings with the consent of the parties, but does not allow a magistrate to enter a default judgment against a party as a sanction for a discovery violation. *Goderstad v. Dillon Cos., Inc.*, 971 P.2d 693 (Colo. App. 1998).

Subject matter jurisdiction for proceedings to determine parentage and related issues is conferred on the magistrate by § 19-1-108 (1). *In re A.P.H.*, 98 P.3d 955 (Colo. App. 2004).

Requirement in § 19-1-108 (3)(a) that a magistrate inform the parties of their right to a hearing before a judge in the first instance is mandatory. *In re R.G.B.*, 98 P.3d 958 (Colo. App. 2004).

Rule 7. Review of District Court Magistrate Orders or Judgments

(a) Orders or judgments entered when consent not necessary. Magistrates shall include in any order or judgment entered in a proceeding in which consent is not necessary a written notice that the order or judgment was issued in a proceeding where no consent was necessary, and that any appeal must be taken within 21 days pursuant to Rule 7(a).

(1) Unless otherwise provided by statute, this Rule is the exclusive method to obtain review of a district court magistrate's order or judgment issued in a proceeding in which consent of the parties is not necessary.

(2) The chief judge shall designate one or more district judges to review orders or judgments of district court magistrates entered when consent is not necessary.

(3) Only a final order or judgment of a magistrate is reviewable under this Rule. A final order or judgment is that which fully resolves an issue or claim.

(4) A final order or judgment is not reviewable until it is written, dated, and signed by the magistrate. A Minute Order which is signed by a magistrate will constitute a final written order or judgment.

(5) A party may obtain review of a magistrate's final order or judgment by filing a petition to review such final order or judgment with the reviewing judge no later than 14 days subsequent to the final order or judgment if the parties are present when the magistrate's order is entered, or 21 days from the date the final order or judgment is mailed or otherwise transmitted to the parties.

(6) A request for extension of time to file a petition for review must be made to the reviewing judge within the 21 day time limit within which to file a petition for review. A motion to correct clerical errors filed with the magistrate pursuant to C.R.C.P. 60(a) does not constitute a petition for review and will not operate to extend the time for filing a petition for review.

(7) A petition for review shall state with particularity the alleged errors in the magistrate's order or judgment and may be accompanied by a memorandum brief discussing the authorities relied upon to support the petition. Copies of the petition and any supporting brief shall be served on all parties by the party seeking review. Within 14 days after being served with a petition for review, a party may file a memorandum brief in opposition.

(8) The reviewing judge shall consider the petition for review on the basis of the petition and briefs filed, together with such review of the record as is necessary. The reviewing judge also may conduct further proceedings, take additional evidence, or order a trial de novo in the district court.

(9) Findings of fact made by the magistrate may not be altered unless clearly erroneous. The failure of the petitioner to file a transcript of the proceedings before the magistrate is not grounds to deny a petition for review but, under those circumstances, the reviewing judge shall presume that the record would support the magistrate's order.

(10) The reviewing judge shall adopt, reject, or modify the initial order or judgment of the magistrate by written order, which order shall be the order or judgment of the district court.

(11) Appeal of an order or judgment of a district court magistrate may not be taken to the appellate court unless a timely petition for review has been filed and decided by a reviewing court in accordance with these Rules.

(12) If timely review in the district court is not requested, the order or judgment of the magistrate shall become the order or judgment of the district court. Appeal of such district court order or judgment to the appellate court is barred.

(b) Orders or judgments entered when consent is necessary. Any order or judgment entered with consent of the parties in a proceeding in which such consent is necessary is not subject to review under Rule 7(a), but shall be appealed pursuant to the Colorado Rules of Appellate Procedure in the same manner as an order or judgment of a district court. Magistrates shall include in any order or judgment entered in a proceeding in which consent is necessary a written notice that the order or judgment was issued with consent, and that any appeal must be taken pursuant to Rule 7(b).

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (rule title), (a), IP(b), IP(c), IP(d), (d)(5), IP(e), and (f) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005; IP(a), (a)(5), (a)(6), and (a)(7) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Family Law Magistrates: An Overview of Review and Appeal Procedures", see 32 Colo. Law. 91 (September 2003).

Section (a) of this rule, rather than former rule, applies to a motion filed after the effective date of this rule concerning 1996 child support stipulation. *People ex rel. Garner v. Garner*, 33 P.3d 1239 (Colo. App. 2001).

The consent distinctions in this rule relate to the "with consent" and "without consent" categories established in C.R.M. 6. Thus, review of matters that may be heard by a magistrate without consent of the parties is governed by section (a) of this rule. Conversely, review of those matters that, by rule or statute, required the consent of the parties is governed by section (b). *People ex rel. Garner v. Garner*, 33 P.3d

1239 (Colo. App. 2001).

Parties' consent in family law cases does not make the order subject to expedited appellate procedure prescribed in C.R.M. 7(b). In re Phelps, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

Characterization of a common law marriage determination hinges on context in which the issue is raised. When the common law marriage issue is related to an effort to dissolve a marriage, it constitutes a "family law case", thereby implicating C.R.M. 6(b) and § 13-5-301 (3). In re Phelps, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

A magistrate may, without the consent of the parties, act upon an inmate's in forma pauperis request and dispose of the case in accordance with its ruling thereon. Therefore, it is appropriate for such action to be governed by section (a), which sets out procedures for review of a magistrate's orders and judgments that have been entered without consent of the parties. Bryan v. Neet, 85 P.3d 556 (Colo. App. 2003).

A magistrate's order must fully resolve an issue before it may be reviewed by the district court or appealed to the court of appeals. In re Roosa, 89 P.3d 524 (Colo. App. 2004).

Failure to file motion for review with the reviewing judge justifies dismissal of appeal with prejudice. Matter of Estate of Burnford, 746 P.2d 51 (Colo. App. 1987); Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995); In re Estate of Hillebrandt, 979 P.2d 36 (Colo. App. 1999).

A party is not entitled to appellate review unless the party has first filed a timely motion for district court review of the magistrate's order. Such a motion for review must be filed within 15 days after the date of the magistrate's order. In re McCord, 910 P.2d 85 (Colo. App. 1995); In re Tonn, 53 P.3d 1185 (Colo. App. 2002); In re Moore, 107 P.3d 1150 (Colo. App. 2005).

A party must present an issue to the district court in a petition for review before that issue may be raised in the court of appeals. A party seeking review of a magistrate's decision must raise a particular issue in the district court so that the district court may have an opportunity to correct any error that may have been made by the magistrate. If a party does not raise an issue before the district court in a petition for review, but raises the issue on appeal for the first time, such party seeks to have the court of appeals correct an error that could have been corrected by the district court in a petition for review. People ex rel. K.L-P., 148 P.3d 402 (Colo. App. 2006).

A magistrate's order or judgment entered without the consent of the parties is not a

decree and order to or from which an appeal lies, as envisioned in C.R.C.P. 54(a). Therefore, C.R.C.P. 59 is inapplicable to motions for review of a magistrate's order. In re Moore, 107 P.3d 1150 (Colo. App. 2005).

District court erred in denying appellant's motion for review based on the failure timely to provide a transcript. The Colorado rules for magistrates do not contain a separate section on procedure or any procedural rules specifying any time limits for filing a transcript of a hearing before a magistrate. There is no requirement that a transcript be filed at all in a review proceeding, and there is no requirement that the district court must consider a transcript, if one is provided, when reviewing a magistrate's order. In re Schmidt, 42 P.3d 81 (Colo. App. 2002).

A party seeking review of a magistrate's order shoulders the burden of providing a record justifying the rejection or modification of that order even though this rule does not require that a transcript be filed at all in a review proceeding and it provides no guidance on the procedures for filing a transcript. Absent such a record, the district court may presume that the magistrate's findings were supported by the evidence. In re Rivera, 91 P.3d 464 (Colo. App. 2004).

A magistrate has authority under § 13-5-301 to hear a C.R.C.P. 60(b)(2) motion without the consent of the parties. As a result, a district court has jurisdiction to review the motion. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

The rules governing magistrates do not authorize any motion except a motion for review. Thus, a magistrate's order issued in response to a motion for reconsideration is void. In re Roosa, 89 P.3d 524 (Colo. App. 2004).

Previous courts have concluded that a motion for reconsideration may be deemed a motion for review; therefore, a motion for extension of time to file a motion for reconsideration may also be construed to allow the late filing of a motion for review. In re Coopridge, 140 P.3d 312 (Colo. App. 2006).

When a magistrate enters an order outside the presence of the parties, the 15 days to file for review of the order begins to run on the date the order is mailed, not the date the order is made. In re Talbott, 43 P.3d 734 (Colo. App. 2002); In re Tonn, 53 P.3d 1185 (Colo. App. 2002).

In paternity action where grandmother sought to intervene for visitation rights, § 19-1-108 of the Colorado Children's Code is properly applied, not this rule, if parents have waived the right to a hearing before a judge. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

Magistrate has no authority to reconsider its own order, sua sponte, or to hear a motion

for reconsideration made by a party. Once a magistrate has entered a written and signed order on a matter without consent, a party must

file a motion for review of the magistrate's order with the district court judge. In re M.B.-M., 252 P.3d 506 (Colo. App. 2011).

Rule 8. Functions of County Court Magistrates

(a) Functions in Criminal Cases: A county court magistrate may perform any or all of the following functions in a criminal proceeding:

(1) No consent necessary:

(A) Appoint attorneys for indigent defendants and approve attorney expense vouchers.

(B) Conduct proceedings in traffic infraction matters.

(C) Conduct advisements and set bail in criminal and traffic cases.

(D) Issue mandatory protection orders pursuant to C.R.S. section 18-1-1001.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct hearings on motions, conduct trials to court, accept pleas of guilty, and impose sentences in misdemeanor, petty offense, and traffic offense matters.

(B) Conduct deferred prosecution and deferred sentence proceedings in misdemeanor, petty offense, and traffic offense matters.

(C) Conduct misdemeanor and petty offense proceedings pertaining to wildlife, parks and outdoor recreation, as defined in Title 33, C.R.S.

(D) Conduct all proceedings pertaining to recreational facilities districts, control and licensing of dogs, campfires, and general regulations, as defined in Title 29, Article 7, C.R.S. and Title 30, Article 15, C.R.S.

(b) Functions in Civil Cases: A county court magistrate may perform any or all of the following functions in a civil proceeding:

(1) No consent necessary:

(A) Conduct proceedings with regard to petitions for name change, pursuant to C.R.S. section 13-15-101.

(B) Perform the duties which a county court clerk may be authorized to perform, pursuant to C.R.S. section 13-6-212.

(C) Serve as a small claims court magistrate, pursuant to C.R.S. section 13-6-405.

(D) Conduct proceedings involving protection orders, pursuant to C.R.S. sections 13-14-101 et. seq. and conduct proceedings pursuant to C.R.C.P. 365.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct civil trials to court and hearings on motions.

(B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 355, and conduct post-judgment proceedings.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005.

ANNOTATION

Magistrates exercise authority only at the discretion of the judges who appoint them. Therefore no impropriety in the provision of a court memorandum prohibiting magistrates

from conducting bond hearings. *Wiegand v. Larimer County Court Magistrate*, 937 P.2d 880 (Colo. App. 1996).

Rule 9. Review of County Court and Small Claims Court Magistrate Orders or Judgments

(a) An order or judgment of a county or small claims court magistrate shall be the order or judgment of the county or small claims court.

(b) Any party to a proceeding before a county court magistrate shall appeal an order or

judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the county court.

(c) Any party to a proceeding before a small claims court magistrate shall appeal an order or judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the small claims court.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire rule amended December 5, 1996, effective January 1, 1997; entire chapter amended September 30, 1999, effective January 1, 2000.

Rule 10. Preparation, Use, and Retention of Record

(a) **Record of Proceedings:** Except as provided in C.R.C.P. 16.2 (c)(2)(e), a verbatim record of all proceedings and trials conducted by magistrates shall be maintained by either electronic devices or by stenographic means. The magistrate shall be responsible for maintaining such record and, in the event of subsequent review, for certifying its authenticity.

(b) **Use of the Record:** If otherwise admissible, a certified transcript of the testimony of a witness at a trial or other proceeding before a magistrate may be admitted as evidence in a later trial or proceeding.

(c) **Custody and Retention of Record:** A reporter's notes or the electronic recordings of trial or other proceedings conducted by a magistrate shall be the property of the state, and shall be retained by the appropriate court for a period prescribed in the Colorado Judicial Department Records Management manual. During the period of retention, notes and recordings shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes and recordings shall be considered the property of the state, even though in custody of the reporter, judge, or clerk. After the trial and review or appeal period, the reporter shall list, date and index all notes and recordings and shall properly pack them for storage. Where no reporter is used, the clerk of the court shall perform this function. The court shall provide storage containers and space.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005.

Rule 11. Title of Rules and Abbreviation

The title to these rules shall be Colorado Rules for Magistrates and may be abbreviated as C.R.M.

Source: Amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

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CHAPTER 36

**Uniform Local Rules
for all
State Water Court Divisions**

Adopted by the
SUPREME COURT OF COLORADO

August 13, 1990,

Effective September 1, 1990

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CHAPTER 36

UNIFORM LOCAL RULES FOR ALL STATE WATER COURT DIVISIONS

NOTE: Except as expressly provided in these rules, the Colorado Rules of Civil Procedure, including the state-wide practice standards set out in C.R.C.P. 121, shall apply to water court practice and procedure. All prior water court local rules are repealed.

Law reviews: For article, “Statutory and Rule Changes to Water Court Practice”, see 38 Colo. Law. 53 (June 2009).

Rule 1. Appearances

A party that is a corporation may act through its corporate officers or other nonlawyer agents for the purpose of filing applications and statements of opposition when a case is before the referee (or before the water judge acting as a referee); however, if a pleading supporting or protesting a referee’s ruling is filed, except as otherwise provided by C.R.S. 13-1-127, a corporate applicant shall be represented by and the pleadings shall be signed by, an attorney licensed to practice law in the State of Colorado.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 2. Filing and Service Procedure

(a) For all cases filed pursuant to C.R.C.P. 90 after July 1, 2009, applicants and opposers represented by counsel shall electronically file and serve through the approved judicial branch e-filing service provider all applications, pleadings, motions, briefs, exhibits, and other documents on all parties and on the state and division engineer. C.R.C.P. Rule 121, Section 1-26, Electronic Filing, applies to water court filings. The state or division engineer shall also electronically file and serve upon applicants and opposers in the proceedings their consultation reports described in §§ 37-92-302(2)(a) & (4). Applicants and other parties who are not represented by an attorney shall file with the water clerk a single copy of the application and all other documents in original paper format. The water clerk on behalf of persons not represented by an attorney shall scan and upload such paper-filed documents to the approved judicial branch e-filing system. All documents and correspondence filed after the initial application shall contain the case number. Proof of service of documents, orders, and rulings shall occur through the e-filing system.

(b) An applicant shall file and serve upon all parties at least 21 days prior to hearing on any application before the water judge, a proposed order that sets forth any necessary findings, terms or conditions that the applicant reasonably believes the court should incorporate into the decree.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; entire rule amended and effective February 19, 2009; (b) amended and adopted November 3, 2011, effective January 1, 2012.

Editor’s note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 3. Applications for Water Rights

(a) Applications filed under C.R.C.P. 90 for determination of a water right, determination of a conditional water right, a change of water right, a determination that a conditional

water right has become a water right, approval of a plan for augmentation, a finding of reasonable diligence, approval of a proposed or existing exchange of water, approval to use water outside of the state, and any other matter for which such a standard form exists shall be filed using the standard forms adopted by the water judges, or a format patterned after the standard form containing the information required by the applicable standard form. The applicant shall be responsible for providing all information required by the forms and this Rule 3.

(b) (1) More than one water right, claim or structure may be incorporated in any one application under one caption, provided that the required information is given for each water right, claim, or structure.

(2) Persons alone or in concert may file applications for approval of plans for augmentation, including water exchange projects, and subsequent changes thereto.

(3) In applications for determinations of rights to groundwater described in C.R.S. § 37-90-137(4):

(A) If the applicant claims consent of the owner(s) of the overlying land as the basis for such a determination, the application must include one or more of the following documents as applicable:

i) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(A), the application must include (1) recorded copies of the written consent from the owner(s) of the overlying land to the applicant, which consent includes a legal description of the land and identification of the aquifers for which consent has been given, and (2) an instrument evidencing ownership of such land by such consenting owner(s) at the time such consent was granted.

ii) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(C), the application must include a certified copy of (1) the ordinance or resolution described in C.R.S. § 37-90-137(8) that incorporates groundwater, and (2) the part of the detailed map described in C.R.S. § 37-90-137(8) that shows the land area as to which consent is deemed to have been given.

(B) Two or more overlying land owners may file a joint application for determinations or changes of rights to such groundwater to be withdrawn through a "well field," provided that the application must contain sufficient information to demonstrate that lands subject to the application meet the requirements of a "well field" as defined in the "rules and regulations applying to applications for well permits to withdraw groundwater pursuant to section 37-90-137(4), C.R.S." 2 C.C.R. 402-7. Such joint application may include only claims for determinations or changes of rights to groundwater described in C.R.S. § 37-90-137(4) and plans for augmentation (with or without exchanges) related thereto.

(4) Nothing contained in this rule 3(b) shall prevent the consolidation or bifurcation of applications or portions thereof under other applicable rules or law, or affect or discourage applications involving a single applicant or single water right, claim or structure.

(c) Where more than one water right was conditionally decreed under one case number, each water right so decreed may, but need not be, incorporated again in a single application for a finding of reasonable diligence or to make absolute, regardless of whether such rights remain in common ownership; however, such an application shall not be combined with any other case or application except by leave of court and the owner of each such right shall be an applicant in such application.

(d) The following guidelines shall apply in filing applications:

(1) Every application shall include the legal description of the location of the point of diversion and of the place of storage, if any, of the subject water right, and a general description of the place of use.

(2) In areas having generally recognized street addresses, the street address and also the lot and block number, if applicable, shall be set forth in the application in addition to the legal description of the point of diversion or place of storage.

(3) Every application shall state the name and address of the owner or reputed owner of the land upon which any new diversion or storage structure or modification to any existing diversion or storage structure is or will be constructed, or upon which water is or will be stored, including any modification to the existing storage pool. The applicant may rely upon the real estate records of the county assessor for the county or counties in which the land is located to determine the owner or reputed owner of potentially affected land.

(4) The actual address of the applicant and the mailing address, if different, shall be given in all cases. An address in care of an attorney is not acceptable in the absence of special circumstances which must be set out fully in an accompanying statement and approved by the water judge.

(e) An application for determination of matters relating to underground water rights shall be governed by the following additional requirements:

(1) Such application shall designate each well, using the state engineer's well permit registration or recording number, if one exists. If a permit required by law has been issued by the state engineer, copies of the permit and the well completion and pump installation report, if completed, shall be attached to the application. If the permit was denied, a copy of the order of denial containing the denial number shall be attached. If this documentation is not available at the time of filing of the application, it shall be supplied as soon as practicable.

(2) If the name of the applicant is not the same as the name appearing on the well permit, then prima facie evidence of ownership of the well site must be submitted to the court. Copies of recorded deeds are preferred for this purpose.

(f) An application for approval of a change of water right or plan for augmentation shall include a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; entire rule amended and effective February 19, 2009; (b) and (c) amended and adopted November 3, 2011, effective January 1, 2012.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

ANNOTATION

Law reviews. For article, "Heightened Notice Requirements for Water Rights Applications", see 32 Colo. Law. 93 (June 2003).

Rule 4. Amendments or Corrections

(a) For purposes of the application of C.R.C.P. 15, the application shall be considered to be a complaint, and a statement of opposition shall be considered to be a responsive pleading. An amendment to an application shall contain a legal description of the structures to which the amendment applies.

(b) When an application is amended, or a petition for correction of a ruling or decree is filed, republication shall be required at the expense of the applicant for the following changes:

- (1) A change of over 200 feet in structure location;
- (2) A change causing the well to come within 600 feet of an existing decreed well;
- (3) A change or moving of a structure to a different quarter section;
- (4) An increase in amount of use or addition of type of use, but not a decrease in amount of use or deletion of a type of use;
- (5) A request for an earlier date of appropriation;
- (6) A change in the source of water; or
- (7) Any other change not specifically described that the court in its discretion deems material.

(c) Upon a showing that no person will be injured, the water judge or referee may determine that republication is unnecessary.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

ANNOTATION

Even though an application for the enlargement of a specifically-identified dam placed the location of the dam in the incorrect quarter section, there was no need to amend the application because the application

correctly identified the name of the reservoir and none of the parties would be injured by not republishing the application. *City of Black Hawk v. City of Central*, 97 P.3d 951 (Colo. 2004).

Rule 5. Withdrawal of Application or Other Pleading

(a) An application against which no statement of opposition has been filed may be withdrawn upon written notice to the court and without a court order prior to the entry of a decree.

(b) An application against which a statement of opposition has been filed shall not be withdrawn or dismissed except by order of the court.

(c) A statement of opposition may be withdrawn without order of the court if the opposer files a withdrawal of the statement of opposition certifying that the applicant has consented to the withdrawal. In the absence of consent of the applicant, the withdrawal of a statement of opposition must be approved by order of the court.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 6. Referral to Referee, Case Management, Rulings, and Decrees

(a) The water judge shall promptly refer to the water referee all applications except those the water judge determines to retain for adjudication. The referee upon referral by the water judge has the authority and duty in the first instance to promptly begin investigating and to rule upon applications for determinations of water rights, determinations of conditional water rights, changes of water rights, approval of plans for augmentation, findings of reasonable diligence in the development of conditional water rights, approval of a proposed or existing exchange of water, approval to use water outside of the state, and other water matters, in accordance with the applicable constitutional, statutory, and case law. Upon investigating the matter, the referee may re-refer an application to the water judge for adjudication.

(b) The referee's authorities and duties include: assisting potential applicants to understand what information is required to be included in an application; in accordance with C.R.C.P. 90, consulting with the water clerk to ascertain whether applications substantially contain the information required by Water Court Rule 3 and the standard forms approved by the water judges and, if not, providing the applicant through the water clerk a list of the required information that was not included in the application; investigating each application to determine whether or not the statements in the application and statements of opposition are true and becoming fully advised with respect to the subject matter of the applications and statements of opposition; conferring with the division engineer and the parties concerning applications and working with the division engineer and the parties to obtain additional information that will assist in narrowing the issues and obtaining agreements; and issuing the referee's ruling and proposed decree in the case. The referee's ruling and proposed decree shall set forth appropriate findings and conditions as required by C.R.S. §§ 37-92-303 & 305, and shall be in an editable format acceptable to the water judge.

(c) The referee shall work promptly to identify applications that will require water judge adjudication of the facts and/or rulings of law and re-refer those applications to the water judge.

(d) The applicant shall have the burden of sustaining the application and, in the case of a change of water right, a proposed or existing exchange of water, or a plan for augmentation, the burden of showing the absence of injurious effect. Expert reports, disclosures,

and opinions presented to the referee shall include the signed Declaration of Expert set forth in the applicable water court form.

(e) To promote the just, speedy, and cost efficient disposition of water court cases, the goals of the referee, as contemplated by C.R.S. § 37-92-303(1), shall include a ruling on each unopposed application within 60 days after the last day on which statements of opposition may be filed, and all other applications as promptly as possible. In pursuit of this goal, the referee shall initiate consultation with the division engineer in every case promptly after the last day for filing statements of opposition. The division engineer's written report on the consultation is due within 30 days of the date the referee initiates consultation in accordance with C.R.S. § 37-92-302(4), except that for applications that require construction of a well, the division engineer's written report is due within 4 months after the filing of the application in accordance with C.R.S. § 37-92-302(2)(a). Upon request, the referee may extend the time for filing the division engineer's written report. The division engineer may submit additional written reports upon receipt of new information and shall provide them to the referee and all parties. The referee shall not enter a ruling on applications for determination of rights to groundwater from wells described in C.R.S. § 37-90-137(4) until the state engineer's office has had the opportunity to issue a determination of facts concerning the application in accordance with C.R.S. § 37-92-302(2)(a). The referee and the division engineer may confer and jointly agree to forego consultation in a particular case because it is not needed; and, if so, the referee shall enter a minute order as provided in section (o) of this Rule 6.

(f) For good cause, upon agreement of the parties, or sua sponte, the referee may extend the time for ruling on the application beyond 60 days after the last day on which statements of opposition may be filed but not to exceed a total of 1 year following the deadline for filing statements of opposition, except that the referee may extend the time for entering a ruling to a specified date that is not more than 182 days after the expiration of the one year period, upon finding that there is a substantial likelihood that the remaining issues in the case can be resolved, without trial before the water judge, in front of the referee.

(g) If no statements of opposition to an application have been filed, the applicant's attorney shall promptly provide the referee with a proposed ruling and decree for consideration by the referee. The referee will prepare the ruling and decree for pro se applicants, and in all cases may convene such conferences or hearings as will assist in performance of the referee's duties.

(h) For all applications in which statements of opposition are filed, the attorney for the applicant, or the referee if the applicant is not represented by counsel, shall set a status conference with the referee and all parties. The status conference shall occur within 63 days after the deadline for filing of statements of opposition, unless the deadline is extended by the referee for good cause. The status conference may be conducted in person or by telephone. All parties must attend the status conference unless excused by the referee. The referee shall advise the division engineer of the status conference and invite or require the division engineer's participation. To assist discussion at the status conference, applicants are encouraged to prepare and circulate a proposed ruling and proposed decree to the referee and the parties in advance of the conference.

(i) During the status conference, the referee and the parties will discuss the issues raised by the application and any statements of opposition, what additional information or investigations will be necessary to assist the parties and the referee to understand and resolve disputed issues and to assist the referee's preparation of a proposed ruling and proposed decree, and determine whether it will be possible to resolve the application and any objections without re-referring the application to the water judge for adjudication.

(1) If it is unlikely that the application and objections can be resolved without adjudication by the water judge, then the referee shall promptly re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

(2) If the applicant or another party does not believe that the application can be resolved without water judge adjudication and so notifies the other parties and the referee at the status conference, then the party shall promptly file a motion to refer the application to the water judge in accordance with C.R.S. § 37-92-303(2).

(3) The provisions of Water Court Rule 6 (j)-(l) apply to applications that remain before the referee upon agreement of the parties as a result of the status conference.

(4) As a condition for remaining before the referee instead of referring the application to the water judge for adjudication, the parties shall waive their statutory right to re-refer the application to the water judge for the period established in the case management plan. During such period the application may be referred to the water judge only with the consent of all parties or the consent of the referee.

(j) The parties shall discuss at the status conference whether expert investigations will be needed. If expert investigations are needed, the referee and the parties will discuss whether it would be appropriate for the parties to engage a single expert to make the necessary investigation and report the results of the investigation to the parties. The use of a single expert is not mandatory, and any party may choose to utilize its own expert. If all parties agree that the use of a single expert is desirable, the single expert shall be chosen by mutual agreement among the parties. If all parties agree that the use of a single expert is desirable, but the parties cannot agree on who should be selected, the referee may appoint a single consulting expert. The parties shall divide the costs of a single consulting expert equally among themselves unless a different cost allocation is agreed upon by the parties. If the parties agree to use a single expert in proceedings before the referee, then, absent the consent of all parties, that expert shall not be permitted to testify as an expert for a party in the same proceeding if the application is re-referred to the water judge or if a protest is filed by a party to the ruling of the referee.

(k) In consultation with the parties, the referee shall establish a case management plan for obtaining the necessary information and preparing a proposed ruling and proposed decree. The case management plan shall set forth a timetable for disposition of the application.

(l) Regardless of whether any expert is involved in the proceedings before the referee, the referee shall not be bound by the opinions and report of the expert, may make investigations without conducting a formal hearing, including site visits, and may enter a ruling supported by the facts and the law. The case management plan shall contain a listing of the disputed issues to the extent known, the additional information needed to assist in resolution of the disputed issues, additional investigations needed to assist in resolving the disputed issues, an estimate of the time required to complete the tasks, the time for filing a proposed ruling and proposed decree, the time for opposers to file comments on the proposed ruling and proposed decree, the time for the applicant to file status reports, and a schedule for further proceedings. The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and proposed decree. The proceedings before the referee shall be completed and the proposed ruling and proposed decree issued no later than 1 year following the deadline for filing of statements of opposition, except that the referee may extend the time as specified in subsection (f) above.

(m) If the parties are able to reach a resolution of the application, and the referee finds it to be supported by the facts and the law, the referee shall work with the parties to fashion an appropriate proposed ruling and proposed decree for filing with the water judge for approval. If such a resolution cannot be reached within the time period allowed by the case management plan, the referee shall enter a ruling on the application, which may be protested to the water judge as provided in C.R.S. § 37-92-304(2), or the referee may re-refer the application to the water judge, or any party may file a motion to re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

(n) At any time after the status conference on applications to which statements of opposition have been filed, or after the filing of applications to which no statements of oppositions have been filed, if some further information is reasonably necessary for the disposition of the application, the referee may require the applicant to supply the information in writing, by affidavit or at an informal conference or at a hearing. The referee may ask the division engineer for information as part of the referee's ongoing informal investigation, but shall discontinue making such requests if the state or division engineer has become a party to the case.

(o) The referee shall enter minute orders summarizing all conferences with the parties or the division or state engineers.

(p) The referee shall have the authority to dismiss for failure to prosecute applications of parties who fail to comply with the requirements of the Water Court Rules or any case management plan, and to dismiss statements of opposition of parties who fail to comply with the requirements of the water court rules or any case management plan. Such dismissal may be protested to the water judge by any party within 21 days from the date of the order of dismissal.

(q) Any time period contained in the water court rules, or the applicable rules of civil procedure, for an action by the referee or a party may be extended by the water judge for good cause. At any time the water judge determines that an application can be resolved without adjudication by the water judge, the water judge may refer the application back to the referee for disposition. To assist in the adjudication of water matters that are before the water judge, the water judge may direct the referee to perform identified tasks.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and effective February 19, 2009; (e), (f), (h), (l), and (p) amended and adopted November 3, 2011, effective January 1, 2012.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 7. Intervention

A Motion to Intervene shall be in accordance with C.R.S. 37-92-304 (3). A failure to file a timely objection may be considered a confession of the Motion.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 8. Briefs

Briefs shall be filed and served in accordance with Water Court Rule 2. A brief shall not exceed thirty pages, double-spaced, without permission of the court. Counsel are encouraged to include a table of contents and a table of cases cited, which shall not be counted as part of the thirty-page limit.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and effective February 19, 2009.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 9. Transfer of Conditional Water Right and Change of Address

(a) Upon the sale or other transfer of a conditional water right, the transferee shall file with the water court having jurisdiction a notice of transfer which shall state:

- (1) The title and case number of the case in which the conditional decree was issued;
- (2) The description of the conditional water right transferred;
- (3) The name of the transferor;
- (4) The name and mailing address of the transferee; and
- (5) A copy of the recorded deed.

(b) The owner of any conditional water right shall notify the clerk of the water court having jurisdiction of any change in mailing address.

(c) The clerk shall place any notice of transfer or change of address in the case file in which the conditional decree was entered and in the case file in which the court first made a finding of reasonable diligence.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 10. Exhibits

All exhibits offered in evidence shall be marked for identification by the reporter during the trial, unless previously marked at the court status conference or pursuant to a case management order, and shall remain in the custody of the clerk or reporter as designated by the judge, unless withdrawn by order of the court.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

**Rule 11. Pre-Trial Procedure, Case Management, Disclosure,
and Simplification of Issues**

The provisions of C.R.C.P. Rules 16 and 26 through 37 shall apply except that they shall be modified as follows:

(a) C.R.C.P. 16(b)-(e) shall be modified as follows:

(b) **Presumptive Case Management Order.** Except as provided in section (c) of this Rule, the parties shall not file a Case Management Order and subsections (1)-(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue, unless the water court orders otherwise for good cause shown. The time periods specified in this case management order are provided to take into account protested or re-referred cases that involve computer modeling or detailed technical analysis. Parties and counsel are encouraged to request a Modified Case Management Order, pursuant to section (c), to shorten time periods whenever possible, unless the water court orders otherwise for good cause shown.

(1) **At Issue Date.** Water matters shall be considered to be at issue for purposes of C.R.C.P. Rules 16 and 26 49 days after the earlier of either of the following: entry of an order of re-referral or the filing of a protest to the ruling of the referee, unless the water court directs otherwise. Unless the water court directs otherwise, the time period for filing a Certificate of Compliance under subsection (b)(7) of this Rule shall be no later than 77 days after a case is at issue.

(2) **Responsible Attorney.** For purposes of Rule 16, as modified herein, the responsible attorney shall mean applicant's counsel, if the applicant is represented by counsel, or, if not, a counsel chosen by opposers, or the water court may choose the responsible attorney. The responsible attorney shall schedule conferences among the parties, prepare and file the Certificate of Compliance, and prepare and submit the proposed trial management order.

(3) **Confer and Exchange Information.** No later than 14 days after the case is at issue, the lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses, the matters to be disclosed pursuant to C.R.C.P. 26(a)(1), the development of a Certificate of Compliance, and the issues that are in dispute.

(4) **Trial Setting.** No later than 63 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the water court.

(5) **Disclosures.**

(A) The time for providing mandatory disclosures pursuant to C.R.C.P. 26(a)(1) shall be as follows:

(I) Applicant's disclosure shall be made 35 days after the case is at issue;

(II) An opposing party's disclosure shall be made 35 days after applicant's disclosures are made.

(B) The time periods for disclosure of expert testimony pursuant to C.R.C.P. 26(a)(2) shall be as follows:

(I) The applicant's expert disclosure shall be made at least 245 days before trial;

(II) The applicant's supplemental expert disclosure, if any, shall be made after the first meeting of the experts held pursuant to subsection (b)(5)(D)(I) of this Rule, and served at least 182 days before trial;

(III) An opposer's expert disclosure shall be made at least 126 days before trial;

(IV) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(5)(B)(III) of this Rule, such expert disclosure shall be made no later than 91 days before trial.

(C) **Additional Expert Disclosures.** In addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I), the expert's disclosure shall include:

(I) A list of all expert reports authored by the expert in the preceding 5 years; and
(II) An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions. The court may require the party to whom this information is disclosed to pay the reasonable cost to convert the data from the electronic format in which it is maintained in the expert's normal course of business to a format that can be used by the expert for the opposing party(ies).

(D) **Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**

(I) The expert witness(es) for the applicant and the opposer(s) shall meet within 49 days after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.

(II) The expert witness(es) for the applicant and the opposer(s) shall meet within 28 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.

(III) The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated experts(s).

(E) **Declaration By Expert.** Expert reports, disclosures, and opinions are rendered to the water court under professional standards of conduct and duty to the court. No person, including a party's attorney, shall instruct an expert to alter an expert's report, disclosures, or opinion. This does not preclude suggestions regarding the factual basis, accuracy, clarity, or understandability of the report, disclosure, or opinion, or proofreading or other editorial corrections, or an attorney communication of legal opinion to the expert of the attorney's client. The expert shall not include anything in his or her expert report, disclosure, or opinion that has been suggested by any other person, including the attorney for the expert's client, without forming his or her own independent judgment about the correctness, accuracy, and validity of the suggested matter. Matters of legal opinion pertinent to formulation of the expert's report, disclosure, or opinion are within the professional province and duty to the court of the attorney who represents the client who has retained the expert. Each expert witness's written disclosure, report, or opinion shall contain a declaration by the expert as set forth in the applicable water court form.

(F) **Proposed Decree.** Applicant shall provide proposed findings of fact, conclusions of law and decree at the time of its initial C.R.C.P. 26(a)(2) disclosures. All opposers shall

provide comments on the proposed decree, including the language of specific decree provisions deemed necessary by the opposers, at the time of opposers' initial C.R.C.P. 26(a)(2) disclosures. Applicant shall respond to opposers' suggested decree language by providing an additional draft decree at the time of its rebuttal C.R.C.P. 26(a)(2) disclosures. In circumstances where, as a result of identification of witnesses and documents within the time frame for such identification set forth in this Presumptive Case Management Order but with insufficient time to allow responsive discovery or supplementation by an opposing party, then modification of this Presumptive Case Management Order shall be freely granted.

(6) Settlement Discussions.

(A) No later than 35 days after the case is at issue, the parties shall explore possibilities of a prompt settlement or resolution of the case.

(B) No later than 63 days before trial the parties shall jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial.

(7) Certificate of Compliance. No later than 77 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(7) (except (b)(5)(B) through (F) and (b)(6)(B)), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply. A request for a Case Management Conference shall be made at the time for filing the Certificate of Compliance.

(8) Time to Join Additional Parties and Amend Pleadings. The time to join additional parties and amend pleadings shall be in accordance with C.R.C.P. 16(b)(8).

(9) Pretrial Motions. Unless otherwise ordered by the court, the time for filing pretrial motions shall be no later than 35 days before the trial date, except that motions pursuant to C.R.C.P. 56 shall be filed at least 91 days before the trial date.

(10) Discovery Schedule. Until a case is at issue, formal discovery pursuant to C.R.C.P. 26 through 37 shall not be allowed. Informal discovery, including discussions among the parties, disclosure of facts, documents, witnesses, and other material information, field inspections and other reviews, is encouraged prior to the time a water case is at issue. Unless otherwise directed by the water court or agreed to by the parties, the schedule and scope of discovery shall be as set forth in C.R.C.P. 26(b), except that depositions of expert witnesses shall not be allowed until 28 days after the time for filing of the opposers' C.R.C.P. 26(a)(2) disclosures. The date for completion of all discovery shall be 49 days before the trial date.

(c) Modified Case Management Order. Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section.

(1) Stipulated Modified Case Management Order. No later than 77 days after the case is at issue, the parties may file a Stipulated Proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a Case Management Conference.

(2) Disputed Motions for Modified Case Management Orders. C.R.C.P. 16(d) shall apply to any disputes concerning a Proposed Modified Case Management Order. If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a Proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 77 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the Proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as "disputed" in the Proposed Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought

including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The motion for a Modified Case Management Order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(3) **Court Ordered Modified Case Management Order.** The water court may order implementation of a Modified Case Management Order if the Court determines that the Presumptive Case Management Order is not appropriate for the specific case. The Court shall not enter a Court Ordered Modified Case Management Order without first holding a Case Management Conference pursuant to C.R.C.P. 16(d).

(d) C.R.C.P. 16(c), C.R.C.P. 16(f)(3)(VI)(C), and C.R.C.P. 16(g) shall not apply to water court proceedings.

COMMITTEE COMMENT

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11 is further amended in subsection (b)(5)(D)(III) to make explicit, the non-discoverability and non-admissibility of the notes, records, content of discussions, and written statement prepared by the experts in accordance with the rule, and, further, to clarify that the meetings of the experts exclude attorneys for the parties or the parties themselves unless they are designated experts. These clarifying changes apply nunc pro tunc on and after July 1, 2009.

In addition, the following Suggested Guide is included in this Comment by way of example for conduct of the meetings of the experts and preparation of the joint written statement of the experts.

Suggested Guide for Conducting Meetings of the Experts in Water Court Proceedings and Preparing Written Statement

Introduction

The purpose of this guide is to assist experts engaged in water court cases to efficiently conduct the first and second meetings of the experts described in Water Court Rule 11 and prepare the written statement of the experts. As the title above indicates, this guide provides suggested procedures and guidelines in conducting these meetings and preparing the written statement. The experts in each case may adapt these guidelines for their own specific circumstances.

Conduct of the Two Meetings

Meeting Notes:

Water Court Rule 11(b)(5)(D)(III), as amended effective July 1, 2011 nunc pro tunc on and after July 1, 2009 reads:

- “The content of the meetings of the experts and the written statement prepared

pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).”

Tips for Conducting the Meetings of Experts:

- Applicant’s expert is the chair and therefore controls the flow of the meetings. If the Applicant has more than one expert in the case, one of its experts should be designated to run the meeting.
- Pass a signup sheet for names, phone numbers and email addresses.
- Prepare an agenda and stick to it.
- Limit protracted discussions and arguing.
- Don’t become entangled in difficult issues and fail to cover others.
- OK to identify legal issues, but don’t argue and discuss in detail.
- Try to keep meetings to a reasonable length.
- Participation in person is encouraged.

Scheduling the Meetings of the Experts:

Scheduling of the meetings of the experts is to be initiated by counsel for the parties, led by the attorney for the Applicant. The selected date should involve the largest number of participating experts possible. If scheduling does not permit one or more experts to attend, they have the option of submitting initial comments to the group via email prior to the meeting.

First Meeting of the Experts

Excerpt from Rule 11(b)(5)(D)(I):

“Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion

and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.

The expert witness(es) for the applicant and the opposer(s) shall meet within 45 days after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts."

Timing of First Meeting:

Within 45 days following Applicant's initial expert disclosures.

Goals:

- Allow Applicant's experts to explain the engineering approach in the application.
- Identify and screen issues pertaining to facts and expert opinions.
- Discuss Applicant's draft decree provisions dealing with issues of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable issues of fact and expert opinion in a supplemental report prior to the opposers' disclosures.
- Clarify issues of fact and expert opinion and clear up misunderstandings relating to the case.
- Exchange information, such as additional backup data and calculations relating to the expert disclosures.

Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

Suggested Sample Agenda for First Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals of expert meeting.
- Applicant's experts give a brief overview of the application.
- Applicant's experts walk through facets of case, one at a time.
 - Poll opposers' experts for whether or not they have issues for each facet.
 - Note and put aside contested issues for later discussion.

- Opposers' experts discuss concerns regarding Applicant's initial disclosures.
 - Go around table, each opposer's expert provides brief discussion of areas of disagreement.
 - Provide alternative approaches if applicable.
- Applicant's experts verbally summarize issues discussed in meeting.
 - Categorize issues into areas of agreement and disagreement.
- Q & A Session
 - Exchange of information, arrange to provide additional backup information, if necessary.
- Schedule second meeting of the experts, if appropriate.
- Adjourn

Second Meeting of the Experts**Excerpt from Rule 11(b)(5)(D)(II):**

"The expert witness(es) for the applicant and the opposer(s) shall meet within 25 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures."

Timing of Second Meeting:

Within 25 days following Opposers' expert disclosures.

Goals:

- Identify and screen remaining disputed matters of facts and expert opinion.
- Discuss decree provisions dealing with matters of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable matters of fact and expert opinion in their forthcoming rebuttal reports.
- Organize a plan and schedule for preparing joint written statement setting forth disputed and undisputed matters of fact and expert opinion.

Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.

- Engage in unproductive argument.
- Write decree language.

Suggested Sample Agenda for Second Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals for meeting.
- Applicant's experts walk through matters of fact and expert opinion identified in objectors' expert disclosures. Applicant's experts do the following for each issue:
 - Summarize the matter.
 - Identify which parties' experts raised the matter.
 - Ask objectors' experts for additional explanation or clarification, if necessary.
 - Indicate whether issue appears to be resolvable, not resolvable, or if there may be common ground to limit the issue.
 - Call on objectors' experts to comment on matter, and possible common ground.
 - Repeat for each matter.
- Objectors' experts indicate if there are other matters of fact and expert opinion that were not discussed by the Applicant's experts.
- Discuss process and schedule to prepare joint written statement.
 - One of the Applicant's experts prepares first draft and emails to objectors' experts. This should be done quickly while contents of meeting are fresh.
 - Objectors' experts email comments on draft written statement to all experts.
 - One of Applicant's experts prepares final joint written statement, considering comments from objectors' experts. If, based on the comments from objectors' experts, any disagreement exists as to how an issue is summarized, then this disagreement should be set forth in the final joint written statement.
 - One of Applicant's experts submits final joint written statement to all experts and to Applicant's attorney for distribution to parties.
- Adjourn meeting

Purpose of Joint Written Statement Excerpt from Rule 11(b)(5)(D)(II):

"Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures."

The written statement is not admissible at trial. The statement will be provided to all the parties and will be used by the attorneys when preparing a statement that will be filed with the court setting forth the undisputed matters of fact and expert opinion and the disputed matters of fact and expert opinion that remain for trial.

Suggested Process to Prepare Joint Written Statement

One of the last agenda items for the second meeting of the experts should be discussion of the process, schedule and content of the joint written statement. One of the Applicant's experts should take the lead and prepare the first draft of the statement and send it to the other experts in the case. This should be done immediately after the meeting. Opposers' experts should promptly provide comments to Applicant's experts. If the experts cannot agree on specific language in the statement, this disagreement should be noted in the document. For guidance only, the following is a suggested outline of a sample written statement of the experts.

Suggested Outline of Sample Written Statement of the Experts

Case No. [xxCWxxx]

Applicant: [name of applicant]

Joint Statement of Undisputed Matters of Fact and Expert Opinion and Remaining Disputed Matters of Fact and Expert Opinion

[Date]

In accordance with Water Court Rule 11(b)(5)(D)(II) and the Case Management Order in Case No. [xxCWxxx], the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures. The first meeting of the experts working on this case was held at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. The second meeting of the experts in this application met at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. A draft of the joint written statement was prepared by [expert for applicant] and was delivered to the experts for objectors [objector No. 1, name of expert(s)], [objector No. 2, name of expert(s)], [objector No. 3, name of expert(s)] on [date].

The requirements of these rules may be modified with approval of the water court upon agreement of the parties, or by the court, in exceptional cases to meet emergencies or to avoid substantial injustice or great hardship. Any request for modification shall be presented to the judge before whom the case is pending and shall state in writing the grounds supporting it. The opposing party shall be given reasonable notice and an opportunity to contest the request in writing.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; committee comment added and adopted November 3, 2011, effective January 1, 2012.

COMMITTEE COMMENT

The amendment to the water court rules effective January 1, 2012 adopt the “rule of 7” numbering for procedural time periods specified in these water court rules. Statutorily-prescribed time periods incorporated into the rules have not been changed, except to express those time periods in numbers instead of words.

The amendments to water court rule 3 effective January 1, 2012 address applications that

contain multiple claims, rights and structures, including applications filed by multiple applicants. Deletion of the words “and that each has the same ownership” from the former water court rule 3(b), now numbered water court rule 3(b)(1), is not intended to alter or change any provision of law pertaining to ownership of a claim, right or structure that may otherwise be applicable to the adjudication of an application.

APPENDIX 1 TO CHAPTER 36

**Uniform Local Rules
for all
State Water Court Divisions**

APPENDIX 1 TO CHAPTER 36

COLORADO WATER COURT FORMS

(Additional Water Court forms are available from the
Colorado Judicial Branch web page at <http://courts.state.co.us>)

SPECIAL FORM INDEX

- | | |
|---------|--|
| Form 1. | Sample Modified Case Management Order. |
| Form 2. | Declaration of Expert Regarding Report, Disclosure, and Opinion. |

Form 1.

District Court, Water Division _____, Colorado Court Address: CONCERNING THE APPLICATION FOR WATER RIGHTS OF Applicant: In the _____ River or its Tributaries In _____ COUNTY	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
SAMPLE MODIFIED CASE MANAGEMENT ORDER	

Counsel for Applicant(s) and Opposer(s) have agreed to the contents of the following proposed Case Management Order for the above referenced application for water rights, except as specifically noted below. (Add if a case management conference is to be requested.) Matters upon which all counsel have not agreed are designated as "Disputed" in this proposed Case Management Order.

I. TRIAL SETTING

The parties anticipate that a trial of days in length will be required. The trial has been scheduled for days beginning on _____ (date). The parties acknowledge their duty to promptly notify the court in writing if the anticipated length of the trial changes.

II. DISCLOSURE

A. Pursuant to C.R.C.P. 26(a)(1). Disclosures pursuant to C.R.C.P. 26(a)(2) and Water Court Rule 11 were made by the applicant on _____ (date). Opposers' C.R.C.P. 26(a)(2) disclosures are due on _____ (date).

B. Pursuant to C.R.C.P. 26(a)(2) (Experts). The parties anticipate the need for expert witnesses at the trial of this application for water rights.

1. Applicant shall disclose the identity of persons who may present evidence at trial pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence, along with the information required by C.R.C.P. 26(a)(2), on or before _____ (date).
2. The Opposers shall disclose the identity of persons who may present evidence at trial pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence, along with the information required by C.R.C.P. 26(a)(2), on or before _____ (date).
3. If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party, such disclosures shall be made no later than 91 days before trial.

C. Continuing Duty to Disclose. The parties acknowledge a continuing duty to timely supplement or correct the information provided pursuant to C.R.C.P. Rules 26(a)(1) and 26(a)(2), pursuant to C.R.C.P. 26(e).

III. IDENTIFICATION OF PERSONS, DOCUMENTS AND TANGIBLE THINGS

Each party will identify all persons who may be called as witnesses, as well as documents and tangible things which might be introduced at trial, not otherwise disclosed pursuant to C.R.C.P. 26(a)(1), on or before , 20_. [This date shall be no later than the date established for the completion of discovery in Section IV. below.] The identification shall be in accordance with the provisions of C.R.C.P. 26(a)(4). To the extent that the identification described above or discovery conducted after the date identified above causes any party to wish to identify additional witnesses, documents, or tangible things which may be introduced at trial and which could not have reasonably been previously identified, modification of the Case Management Order to permit additional identification by such party shall be freely allowed.

IV. DISCOVERY SCHEDULE

Discovery shall be in accordance with Water Court Rule 11. The date for completion of discovery shall be _____ (date - no later than 49 days prior to trial or such time as the court shall direct). The undersigned counsel, certify that they have advised their clients of the estimated costs and fees involved in conducting such discovery.

V. TIME TO JOIN ADDITIONAL PARTIES AND AMEND PLEADINGS.

The parties ☐do ☐do not anticipate the need for joining additional parties or amending the pleadings. The time for joining additional parties and amending the pleadings shall be in accordance with C.R.C.P. 16(b) and Water Court Rule 11.

VI. PRETRIAL MOTIONS

The following motions are currently pending before the court: (Add appropriate information)

The schedule for the filing of anticipated pretrial motions (other than motions relating to discovery) shall be in accordance with Water Court Rule 11:

VII. SETTLEMENT

The parties expressly affirm that they have discussed settlement. The parties' plans for future efforts to settle the case are as follows:

VIII. OTHER MATTERS

Describe any other matters which are appropriate under the circumstances of the case or which have been directed by the court to be included in the proposed Case Management Order: Applicant shall file and serve upon all parties at least days prior to trial a proposed order that sets forth any necessary findings, terms, or conditions that the applicant reasonably believes the Court should incorporate into the decree, pursuant to Water Court Rule 2(f).

Signature of lead Counsel for Applicant(s) Date

Signature of lead Counsel for Opposer Date

The Case Management Order set forth above is approved by the Court and shall govern the future conduct of this case.

Date: _____

☐ Judge ☐ Referee

Source: Added and effective January 26, 1995; amended and adopted June 28, 2001, effective July 1, 2001; repealed and replaced November 18, 2004, effective January 1, 2005; amended and adopted November 3, 2011, effective January 1, 2012.

Form 2.

District Court, Water Division _____, Colorado		▲ COURT USE ONLY ▲
Court Address:		
CONCERNING THE APPLICATION FOR WATER RIGHTS OF Applicant: In the _____ River or its Tributaries In _____ COUNTY		
Attorney or Party Without Attorney (Name and Address):		Case Number: Division: Courtroom:
Phone Number:	E-mail:	
FAX Number:	Atty. Reg. #:	
DECLARATION OF EXPERT REGARDING REPORT, DISCLOSURE, AND OPINION		

Expert reports, disclosures, and opinions are rendered to the water court under professional standards of conduct and duty to the court. No person, including a party's attorney, shall instruct an expert to alter an expert's report, disclosure, or opinion. This does not preclude suggestions regarding the factual basis, accuracy, clarity, or understandability of the report, disclosure, or opinion, or proofreading or other editorial corrections, or an attorney communication of legal opinion to the expert of the attorney's client. The expert shall not include anything in his or her expert report, disclosure, or opinion that has been suggested by any other person, including the attorney for the expert's client, without forming his or her own independent judgment about the correctness, accuracy, and validity of the suggested matter. Matters of legal opinion pertinent to formulation of the expert's report, disclosure, or opinion are within the professional province and duty to the court of the attorney who represents the client who has retained the expert. Each expert witness's written disclosure, report, or opinion shall contain a declaration by the expert as set forth in the applicable water court form.

Accordingly, I, _____ (name of expert) state the following:

- (1) I understand that my role as an expert, both in preparing this report or disclosure and in giving evidence, is to assist the court to understand the evidence or to determine facts in issue. The opinions expressed in my disclosures and in my report are my own professional opinions.
- (2) I have endeavored in my report and disclosures to be accurate and complete, and have addressed matters that I regard as being material to the opinions expressed, including the assumptions that I have made, the bases for my opinions, and the methods that I have employed in reaching those opinions.
- (3) I have been advised by the attorney for my client of the disclosure requirements of the rules of the court, and I have provided in my report and disclosures the information required by those rules. I have not included anything in my report and disclosures that has been suggested by anyone, including the attorney for my client, without forming my own independent judgment on the matter.
- (4) I will immediately notify, in writing, the attorney for the party for whom I am giving evidence if, for any reason, I consider that my existing report or disclosures requires any correction or qualification; and, if the

correction or qualification is significant, will prepare a supplementary report or disclosure to the extent permitted by the applicable rules of the court.

- (5) I have used my best efforts in my report and disclosures, and will use my best efforts in any evidence that I am called to give, to express opinions within those areas in which I have been offered or qualified as an expert by the court, and to state whether there are qualifications to my opinions.
- (6) I have made the inquiries that I believe are appropriate and, to the best my knowledge, no matters of significance that I regard as relevant have been withheld from the court.
- (7) I have disclosed any financial or pecuniary interest that I have in the results of this lawsuit or in any property or rights that are the subject of the lawsuit for which my report and disclosures are being submitted.

Date: _____

Declarant _____

Source: Added and effective February 19, 2009.

Editor's note: This Form, adopted February 19, 2009, is applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

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CHAPTER 37

**Rules Governing
the Commissions
on Judicial Performance**

Repealed and Readopted by the
SUPREME COURT OF COLORADO

July 16, 2009

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CHAPTER 37

RULES GOVERNING THE COMMISSIONS ON JUDICIAL PERFORMANCE

The State Commission on Judicial Performance with the approval of the Supreme Court repeals and readopts the following rules pursuant to section 13-5.5-103(1)(o)(I), C.R.S., effective July 16, 2009.

Rule 1. Appointments

(a) State and district commissioners shall be appointed to four-year terms, expiring on November 30 in odd-numbered years. A commissioner who resigns or moves out of the district or state shall advise the chair of the commission, the appointing authority, and the state commission. The chair of a commission shall advise the appointing authority and the state commission of any vacancy, and the date of the vacancy, if known. The executive director of the Office of Judicial Performance Evaluation shall within five days, in writing, advise the appropriate appointing authority of the vacancy, whether the vacancy must be filled with an attorney or a non-attorney, and that if no appointment is made within forty-five days of the vacancy, the state commission shall make the appointment.

(b) The executive director of the Office of Judicial Performance Evaluation shall cause to be published and posted at all times on the office's web site the names of the state and district commissioners and the name, address, telephone number, and e-mail address of the executive director of the Office of Judicial Performance Evaluation and each district administrator.

(c) The state commission may recommend to the appointing authority that a member of any commission be removed for cause pursuant to section 13-5.5-104, C.R.S. "Cause" means any malfeasance or nonfeasance in carrying out the commissioner's official duties and responsibilities, including improper disclosure of confidential information, failure to disclose any basis for recusal or to recuse when appropriate, advocating for or against the retention of any particular justice or judge, and failure to participate in three consecutive meetings.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; (a) amended and adopted December 8, 2011, effective January 1, 2012.

Rule 2. Officers

Commissions shall elect a chair and a vice-chair, one of whom should be an attorney, and one of whom should not be an attorney, to serve two-year terms. The terms of the chairs and vice-chairs of the commissions shall expire on November 30 of each even-numbered year.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; entire rule amended and adopted December 8, 2011, effective January 1, 2012.

Rule 3. Procedures

(a) A majority of the total number of appointed members of a commission shall constitute a quorum. The procedures adopted by the state commission shall be used for the conduct of all meetings, evaluations, and other business, except as otherwise provided by these rules or statute.

(b) The state commission shall, prior to final promulgation of any proposed rule, post a notice of the proposed rule, allow for a period of public comment, and give the public an opportunity to address the commission concerning the proposed rule at a public hearing.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 4. Meetings

(a) Although judicial performance commissions are not subject to the Colorado open meetings law, section 24-6-402, C.R.S., they should attempt to comply as fully as practicable with the spirit of that law.

(b) The state commission should post a notice on its web site, including specific agenda information where possible, not less than twenty-four hours prior to the holding of any meeting at which a quorum of the state commission is expected to be in attendance.

(c) The state commission shall conduct all business publicly, unless it has decided to proceed in executive session in accordance with these rules. No adoption of any proposed policy, position, resolution, rule, regulation, or formal action shall occur at any executive session.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 5. Executive Sessions

A motion to go into executive session must be approved by a two-thirds vote of the commissioners, and for only the following purposes:

(a) Consideration of confidential materials as part of an evaluation of a justice or judge, including deliberations. Members of other commissions and staff may not be present during such consideration;

(b) Conferences with an attorney representing the commission concerning disputes involving the commission;

(c) Investigation of charges or complaints against an employee or consideration of dismissal, discipline, promotion, demotion, or compensation of the employee;

(d) Specialized details of security arrangements or investigations, including where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law; or

(e) Any other matter required to be kept confidential by state or federal statutes or rules, including these rules.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 6. Recusal

(a) A commissioner shall:

(i) Disclose to the commission any professional or personal relationship or interest with respect to a justice or judge that may affect an unbiased evaluation of the justice or judge, including any litigation involving the justice or judge and the commissioner, the commissioner's family, or the commissioner's financial interest. A commission may require recusal of one of its members on account of such relationship upon a two-thirds vote of the other commissioners;

(ii) Recuse himself or herself from any evaluation of the person who appointed the commissioner;

(iii) Recuse himself or herself from participating in the consideration and vote on any matter involving the evaluation of a justice or judge for failure of a commissioner to meet the training, courtroom observation, interview, or opinion review responsibilities provided by these rules, unless excused by a two-thirds vote of the other commissioners;

(iv) Once recused, not be present during any part of the evaluation of the justice or judge.

(b) An attorney serving as a commissioner shall not request that a justice or judge being evaluated by the commission be recused from hearing a case in which the attorney appears as counsel of record, or request permission to withdraw from a case pending before a justice or judge being evaluated, solely on the basis that the attorney is serving as a judicial performance commissioner.

(c) An attorney who appears in a matter where opposing counsel or a witness serves as a member of a judicial performance commission which is evaluating the justice or judge before whom the matter is set, may not seek withdrawal of the attorney, exclusion of the witness, or recusal of the justice or judge solely on the basis that the opposing counsel or witness is serving as a judicial performance commissioner.

(d) A justice or judge being evaluated by a judicial performance commission may not recuse himself or herself from a case in which an attorney, party, or witness is a judicial performance commissioner, nor should a justice or judge grant an attorney's request to withdraw from a case, solely on the basis that the attorney, party, or witness is serving as a judicial performance commissioner.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; entire rule amended and adopted December 8, 2011, effective January 1, 2012.

Rule 7. Staff

The executive director of the Office of Judicial Performance Evaluation, district administrators, and their staffs shall assist their respective commissions in the performance of their duties, including meeting and interview arrangements, obtaining and distributing information, and posting notices. Staff shall not participate in interviews or deliberations conducted by the commission concerning the evaluation of any justice or judge nor the drafting of narratives.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 8. Chief Justice or Chief Judge

Prior to beginning any evaluations, each commission shall meet with the chief justice or chief judge of the court for which there is a justice or judge to be evaluated that year. The meeting is to allow the chief justice or chief judge to provide an overview of the court, and shall not concern the evaluation of any justice or judge's performance, unless the commission had previously made a recommendation for improvement for a justice or judge being evaluated that year.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 9. Training

The state commission shall provide training bi-annually that is reasonably accessible and convenient to all commissioners. Each commissioner shall attend one training session, or an appropriate alternative as determined by the state commission, each year in which the commissioner is to evaluate a justice or judge.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 10. Trial Judge Evaluations

(a) The state commission shall develop three separate survey questionnaires: one shall be for appellate judges and justices concerning each district judge; one shall be for

attorneys, including prosecutors, public defenders, and private attorneys, who have appeared before the trial judge; and one shall be for non-attorneys including jurors, litigants, law enforcement personnel, employees of the court, court interpreters, employees of probation offices, employees of local departments of social services and victims of crimes who have appeared before each trial judge being evaluated. Surveys shall be conducted on a continuing basis, and results provided to the district commission and the trial judge. To ensure the anonymity of respondents, a district commission shall not receive completed questionnaires, and all reports of the results shall be based on aggregate data, including the percentage responding as "undecided or don't know enough to respond." Comments shall be separated from completed questionnaires before the comments are forwarded to the trial judge whom each comment concerns.

(b) Each district commissioner shall make unannounced visits to the courtroom to observe at least three of the trial judges being evaluated. The district commission shall ensure that each trial judge being evaluated receives adequate observation.

(c) The district administrator shall provide the district commission with information concerning the caseload, case types, open case reports and case aging reports, and sentence modifications pursuant to section 18-1.3-406, C.R.S. for each trial judge during the period of evaluation, to the extent possible.

(d) The state commission shall develop self-evaluation forms that shall be completed by each trial judge being evaluated.

(e) Each district judge shall submit to the district commission not less than three decisions he or she issued, one of which was reversed on appeal, together with the reversing opinion, if applicable. Each county judge shall submit to the district commission transcripts of three findings of fact, conclusions of law, and orders, one of which was reversed on appeal, together with the reversing decision, if applicable. Each district commission shall review the three decisions or transcripts and any others authored by the trial judge that the commission in its discretion may select for compliance with the statutory criteria for legal knowledge and for thoroughness of findings, clarity of expression, logical reasoning, and application of the law to the facts presented. All decisions and opinions submitted or reviewed shall have been issued during the judge's current term.

(f) A district commission may interview district and county court judges and other persons and accept information and documentation from interested persons, if the person provides his or her name and address. The district commission shall provide the trial judge with a written summary of any oral information, and a copy of any written information, no later than ten days prior to the interview with the commission. The trial judge also may submit additional written information to the commission prior to or after the interview.

(g) The district commission shall interview each trial judge being evaluated following its initial review of information.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; (e) amended and adopted December 8, 2011, effective January 1, 2012.

Rule 11. Appellate Judge and Justice Evaluations

(a) The state commission shall develop four separate survey questionnaires: one shall be for trial judges concerning each appellate judge or justice being evaluated; one shall be for attorneys including prosecutors, public defenders, and private attorneys, who have appeared before the appellate judge or justice; one shall be for other appellate judges and justices, and staff attorneys; and one shall be for employees of the court. Surveys shall be conducted on a continuing basis, and results provided to the state commission and the appellate judge or justice. To ensure the anonymity of respondents, the state commission shall not receive completed questionnaires, and all reports of the results shall be based on aggregate data, including the percentage responding as "undecided or don't know enough to respond." Comments shall be separated before the comments are forwarded to the appellate judge or justice whom each comment concerns.

(b) Each state commissioner shall make unannounced visits to the courtroom to observe at least three of the appellate judges or justices being evaluated. The state

commission shall ensure that each appellate judge or justice being evaluated receives adequate observation.

(c) The clerks of the supreme court and the court of appeals shall provide the state commission with information concerning opinions authored including concurrences and dissents, and cases on desk reports excluding case names for each appellate judge or justice during the period of evaluation, to the extent possible.

(d) The state commission shall develop self-evaluation forms that shall be completed by each appellate judge or justice being evaluated.

(e) Each appellate judge or justice shall submit to the state commission five opinions he or she authored, including both civil and criminal cases, at least one of which is a separate concurrence or dissent, if applicable, and one of which was reversed on appeal, together with the reversing opinion, if applicable, and in the case of a judge of the court of appeals, at least one unpublished opinion. The state commission shall review the five opinions and any others authored by the appellate judge or justice that the commission in its discretion may select for compliance with the statutory criteria for legal knowledge and for adherence to the record, clarity of expression, logical reasoning, and application of the law to the facts presented. All opinions submitted or reviewed shall have been issued during the appellate judge or justice's current term.

(f) The state commission may interview justices and appellate court judges and other persons and accept information and documentation from interested persons, if the person provides his or her name and address. The state commission shall provide the appellate judge or justice with a written summary of any oral information, and a copy of any written information, no later than ten days prior to the interview with the commission. The appellate judge or justice also may submit additional written information to the commission prior to or after the interview.

(g) The state commission shall interview each appellate judge or justice being evaluated following its initial review of information.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; (e) amended and adopted December 8, 2011, effective January 1, 2012.

Rule 12. Recommendations

(a) Following the evaluation based upon the survey data, courtroom observations, case information, self-evaluations, review of decisions, interviews, and any other written or oral information received, a commission shall prepare a recommendation regarding the retention of each justice or judge. The recommendation shall be "retain," "do not retain," or "no opinion." The recommendation of "no opinion" shall be given only when the commission is equally divided, and as such shall not be counted for or against retention. Individual commissioners may not vote "no opinion," but shall vote to retain, or to not retain, or shall recuse themselves.

(b) A commission shall consider a recommendation of "retain" for any justice or judge who receives an average of at least 3.0 on a 4.0 scale for the questionnaire responses, and issued no decision or opinion more than 180 days after a matter was briefed, argued, or otherwise submitted to the court for decision, whichever is latest, unless the other evaluation information indicates a significant performance problem, such as poor judicial temperament.

(c) A commission shall consider a recommendation of "do not retain" for any justice or judge who receives less than an average of 3.0 on a 4.0 scale for the questionnaire responses, unless:

(i) The nature or high number of cases of a justice or judge's docket or caseload is such that it cannot appropriately be managed in a timely manner. This may be particularly true for a provisional justice or judge, who when appointed may inherit a significantly high number of cases that cannot be managed quickly; or

(ii) The commission believes that with additional experience on the bench and a commitment to improve his or her judicial skills, the justice or judge should be given more

time to develop his or her judicial skills. The justice or judge must agree to the recommendations contained in a performance plan that identifies areas of significantly poor performance and makes specific recommendations for improvement.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; (b) and IP(c) amended and effective May 15, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 13. Narratives

(a) Within ten days following the interview, a commission shall provide the justice or judge a complete written draft of the narrative supporting the recommendation. A narrative shall consist of four short paragraphs totaling not more than 500 words, as follows:

(i) The retention recommendation, including the number of commissioners who voted for and against retention;

(ii) Undergraduate and law schools attended, previous substantial legal or public employment, relevant professional activities or awards, and volunteer or other community work;

(iii) A description of the performance of the justice or judge over the past term, including any areas of notably strong or weak performance, any deficiencies identified in the interim evaluation, and the extent to which such deficiency has been satisfactorily addressed, and any additional information that the commission believes may be of assistance to the public in making an informed voting decision;

(iv) A description of the groups of respondents surveyed, whether any of the groups surveyed had an insufficient response rate, the percentage of responses received from each group who recommend that a justice or judge be retained, the percentage received from each group who recommend that a justice or judge not be retained, and the percentage received from each group indicating “undecided or don’t know enough to make a recommendation.”

(b) The justice or judge being evaluated may respond in writing to the draft narrative, and request an additional interview, within ten days of receipt of the draft. Any additional interview shall be held within ten days of the request. The commission may revise the draft narrative, and shall provide the justice or judge with the final narrative within ten days following the additional interview.

(c) Any commission issuing a “do not retain” or “no opinion” recommendation shall, at the justice or judge’s request, include a response from the justice or judge of not more than 100 words. The commission may then change its vote count or revise the draft narrative, and shall provide the justice or judge with the final narrative within ten days following the receipt of the response.

(d) If the commission has identified one or more areas of significantly poor performance, it may recommend to the chief justice or chief judge that the justice or judge be placed on an improvement plan.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; entire rule amended and adopted December 8, 2011, effective January 1, 2012.

Rule 14. Confidentiality

(a) All comments in survey reports, self-evaluations, personal information protected under section 24-72-204(3)(a)(II), C.R.S., additional oral or written information under rules 10(f) and 11(f), content of improvement plans, any matter discussed in executive session under rule 5, and complaints, responses and decisions under rule 16, shall remain confidential except as otherwise specifically provided in these rules. Information from comments in survey reports, self-evaluations, and additional oral or written information under rules 10(f) and (g) and 11(f) and (g), may be summarized for use in a narrative. No commissioner may publicly discuss the substance of the evaluation of any particular justice or judge. Each commission may designate a sole or primary spokesperson to publicly

discuss, between July 1 and December 31 of an election year, the process of evaluating the justices and judges.

(b) All recommendations, narratives, and survey reports are confidential until released to the public on the first day following the deadline for judges to declare their intent to stand for retention. Any comments included in the report shall be made available only to commissioners, the justice or judge being evaluated, and the chief justice or chief judge.

(c) Otherwise confidential information may be released only under the following circumstances:

(i) To the supreme court attorney regulation committee, if an allegation is made against a justice or judge in the course of the evaluation process which, if true, would constitute a violation of the Colorado rules of professional conduct, on the same basis as that body provides confidential information to the state commission;

(ii) To the commission on judicial discipline, if an allegation is made against a justice or judge in the course of the evaluation process, which, if true, would constitute a violation of the code of judicial conduct, or which would constitute extra-judicial conduct that reflects adversely on the judiciary, on the same basis as that body provides confidential information to the state commission; or

(iii) With the consent of the justice or judge. A justice or judge disclosing otherwise confidential information shall be deemed to have consented to the release of related confidential information.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; (a) and (c)(iii) amended and adopted December 8, 2011, effective January 1, 2012.

Rule 15. Records

Upon completing its required recommendations and narratives, each commission shall collect all documents and other information, including all copies, received regarding the justices or judges evaluated. Each commission shall forward the documents and other information, including all copies, to the state commission within 30 days following submission of their recommendations and narratives to the state commission. The state commission shall establish guidelines regarding retention of evaluation information, which shall be made available to commissions in subsequent judicial performance evaluation cycles.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009.

Rule 16. Complaints

(a) Any commissioner, justice or judge may file a written complaint with the state commission regarding any alleged violation of these rules or the statutes governing judicial performance commissions. The state commission shall provide a copy to the chair of the particular district commission, who shall provide a written response. The state commission shall make an independent review and provide its decision to the district commission along with any remedial instructions. The state commission may not reverse any retention recommendation, but may cause a rebuttal to be published with the district commission's recommendation or direct a district commission to revise a narrative within ten days. Should the district commission fail to satisfactorily comply, the state commission may, in its discretion, rewrite the narrative.

(b) The state commission may, following the redaction of confidential information, publically disclose a complaint, response, and the state commission's decision.

Source: Entire chapter repealed and readopted June 28, 2007, effective January 1, 2008; entire chapter repealed and readopted and effective July 16, 2009; entire rule amended and adopted December 8, 2011, effective January 1, 2012.

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CHAPTER 38

**Public Access to
Records and Information**

Adopted by the

SUPREME COURT OF COLORADO

February 23, 1999, effective immediately

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CHAPTER 38

PUBLIC ACCESS TO RECORDS AND INFORMATION

Rule 1. Public Access to Records and Information

The purpose of this rule is to provide the public with reasonable access to Judicial Branch documents and information while protecting the privacy interests of parties and persons. In addition, this rule is intended to provide direction to Judicial Branch personnel in responding to public records requests.

The Chief Justice is authorized to issue directives regarding access of the public to documents and materials made, received, or maintained by the courts. Such Directives of the Chief Justice are orders of the Supreme Court and shall govern release of records to the public. The Chief Justice on behalf of the Supreme Court is authorized, in the implementation of this rule, to appoint committees and assign custodians of records, and to designate the functions of such committees and custodians of records, as the Chief Justice may determine.

The Chief Justice has issued CJD 05-01, which is authorized pursuant to this rule without further action. Pursuant to CJD 05-01, the Chief Justice has appointed a Public Access Committee to adopt policy. The policy of that Committee is effective without further action. Because policy concerning public access to information is in development stages, as are components of the ICON system, the policy of any duly authorized committee appointed by the Chief Justice is effective when adopted. This rule is adopted by the Court on an interim basis, pending a final proposal by the Public Access Committee, public comment thereon, and further action by the court.

Custodians of records within the judicial branch are not authorized to release any records or material to the public inconsistent with this rule or the Chief Justice Directives. This rule is intended to be a rule of the Supreme Court within the meaning of the Colorado Public Records Act, including sections 24-72-204(1)(c) and 24-72-305(1)(b) (7 C.R.S.).

Source: Entire chapter adopted and effective February 23, 1999; entire rule amended and effective February 29, 2012.

Rule 2. Media Coverage of Court Proceedings

(a) Expanded Media Coverage: A judge may authorize expanded media coverage of court proceedings, subject to the guidelines set forth below.

(1) Definitions. As used in this section, unless the context otherwise requires:

(A) "Proceeding" means any trial, hearing, or any other matter held in open court which the public is entitled to attend.

(B) "Photograph" and "photography" means all recording or broadcasting of visual images, by means of still photographs, videotape, television broadcasts, motion pictures, or otherwise.

(C) "Expanded media coverage" means any photography or audio recording of proceedings.

(D) "Judge" means the justice, judge, magistrate, or other judicial officer presiding over the proceedings. In proceedings with more than one judge presiding, any decision required shall be made by a majority of the judges.

(E) "Media" means any news gathering or reporting agency and the individual persons involved, and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional jour-

nals, or any other news reporting or news gathering agency whose function it is to inform the public or some segment thereof.

(2) **Standards for Authorizing Coverage.** In determining whether expanded media coverage should be permitted, a judge shall consider the following factors:

(A) Whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial;

(B) Whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court; and

(C) Whether expanded media coverage would create adverse effects which would be greater than those caused by traditional media coverage.

(3) **Limitations on Expanded Media Coverage.** Notwithstanding an authorization to conduct expanded media coverage of a proceeding, there shall be no:

(A) Expanded media coverage of pretrial hearings in criminal cases, except advisements and arraignments;

(B) Expanded media coverage of jury voir dire;

(C) Audio recording or "zoom" close-up photography of bench conferences;

(D) Audio recording or close-up photography of communications between counsel and client or between co-counsel;

(E) Expanded media coverage of in camera hearings;

(F) Close-up photography of members of the jury.

(4) **Authority to Impose Restrictions on Expanded Media Coverage.** A judge may restrict or limit expanded media coverage as may be necessary to preserve the dignity of the court or to protect the parties, witnesses, or jurors. A judge may terminate or suspend expanded media coverage at any time upon making findings of fact that: (1) rules established under this Rule or additional rules imposed by the judge have been violated; or (2) substantial rights of individual participants or rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

(5) **Conditions for Coverage.** Expanded media coverage shall be conducted only under the following conditions:

(A) **Equipment Limitations.**

(i) **Video.** Only one person at a time shall be permitted to operate a videotape, television, or motion picture camera. There shall be only one such camera at a time in the courtroom, except that, at the discretion of the judge, the camera operator may have a second camera. The camera operator may use a tripod, but shall not change location while court is in session.

(ii) **Audio.** The court's audio system shall be used if technically suitable and, in that event, there must be no interference with the court's use of its system. If the court's system is not technically suitable, then the person conducting expanded media coverage may install an audio recording system at his or her own expense upon first obtaining approval of the judge. All microphones and related wiring shall be unobtrusive and shall not interfere with the movement of those in the courtroom.

(iii) **Still Cameras.** Only one person at a time shall be permitted to operate still cameras, which shall make as little noise as possible. The still photographer may use a tripod, but shall not change location while court is in session.

(iv) **Lighting.** No movie lights, flash attachments, or sudden lighting changes shall be permitted during a proceeding. No modification or addition of lighting equipment shall be permitted without the permission of the judge.

(v) **Operating Signals.** No visible or audible light or signal (tally light) shall be used on any equipment.

(B) **Pooling Arrangements.** The media shall be solely responsible for designating one media representative to conduct each of the categories of expanded media coverage listed in subsection (I) of this section, and for arranging an open and impartial distribution scheme with a distribution point located outside of the courtroom. If no agreement can be reached on either of these matters, then there shall be no expanded media coverage of the type for which no pooling agreement has been made. Neither judges nor other court personnel shall be called upon to resolve any disputes concerning such pooling arrangements.

(C) **Conduct of Media Representatives.** Persons conducting expanded media coverage shall conduct themselves in a manner consistent with the decorum and dignity of the courtroom. The following practices shall apply:

(i) Equipment employed to provide expanded media coverage shall be positioned and operated so as to minimize any distraction;

(ii) Identifying marks, call letters, logos, symbols, and legends shall be concealed on all equipment. Persons operating such equipment shall not wear clothing bearing any such identifying information;

(iii) Equipment used to provide expanded media coverage shall not be placed in, or removed from, the courtroom while court is in session. No film, videotape, or lens shall be changed within a courtroom while court is in session.

(6) **Procedures.** The following procedures shall be followed in obtaining authorization for expanded media coverage:

(A) **Request for Expanded Media Coverage.** A written request shall be submitted to the judge at least one day before expanded media coverage is requested to begin, unless a longer or shorter time is required or permitted by the judge. Copies of the request shall be given to counsel for each party participating in the proceeding. The request shall include the following:

(i) The name, number, date and time of the proceeding;

(ii) The type (audio, video or still photography) of expanded media coverage requested and a description of the pooling arrangements required by section (e)(II), if any, including the identity of the designated representatives.

(B) **Objections.** Any party or witness may lodge with the judge a written objection to expanded media coverage of all or a portion of a proceeding.

(C) **Judicial Authorization.** The judge shall rule on a request or objection within a reasonable time prior to the proceeding or promptly after the request or objection if the proceeding has begun. The ruling shall be made on the record and the reasons therefore set forth briefly.

(D) The media or any witness may not appeal, or seek review by original proceeding, the granting or denial of expanded media coverage. A party to the case may seek review of a ruling by original proceeding, if otherwise appropriate, or by post-trial appeal.

(b) **Other use of Media.**

(1) A judge may authorize the use of electronic or photographic means for the perpetuation of a record, or for purposes of judicial administration.

(2) A judge may authorize the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

Source: Entire rule added and adopted June 24, 2010, effective July 1, 2010.

ANNOTATION

Law reviews. For article, "Expanded Media Coverage in Colorado Courts", see 40 Colo. Law. 39 (September 2011).

